No. 83-1474

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HARRIS-TEETER SUPER MARKETS, INC.,

Petitioner

v.

PAUL LILLY, individually and on behalf of all others similarly situated

and

CHRISTOPHER McKINNEY, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When a corporate employer, over a period of years and in the normal course of the operations of a sizeable business enterprise, has discharged numerous employees, both white and black, individually and for varied and separate causes and

reasons, and thereafter in a suit under 42 U.S.C. §§1981 and 2000e-2 it is shown numerically - but without trial of the causes and circumstances of the individual discharges - that the number of white employees discharged was 586 and the number of black employees discharged was 229 and that the proportion of white employees who were discharged was 21 percent and the proportion of black employees who were discharged was 37.2 percent - do such statistics establish a legal presumption that each and every discharged black employee was discharged "because of" being a black person?

LISTING OF ALL PARTIES IN THE CASE

The Plaintiffs in the case are as follows: - Paul Lilly, individually and on

behalf of all others similarly situated, Christopher McKinney, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Jerome Gary, Curtis Jones, Roy Torrence, John Johnson, Willie Hunt, Roosevelt Patterson, Willie Covington, Michael McVay, Richard Gregory, individually and on behalf of all others similarly situated, Edward Porter, individually and on behalf of all others similarly situated, Phillip Reed, Shirley Gatewood, Woodrow McManus, Hazel Fisher, William Carrothers, Tresevant Goodwin, Richard Burch, Mack Ervin, Barbara Anderson, Austin Pharr, and Therrell McMoore.

The Defendant in the case, now Petitioner in this Court, is Harris-Teeter Super Markets, Inc.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is published at 720 F. 2d 326 (4th Cir., 1983), and is also printed in the separate Appendix which is filed herewith at pages 3-54.

The Findings of Fact and Conclusions of Law and Judgment of the District Court are printed in the separate Appendix which is filed herewith at pages 55-201.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated October 14, 1983, and was entered on that date.

Thereafter within apt time, the Petitioner filed with the Court of Appeals a Petition for Rehearing and Suggestion

for Rehearing en banc, which was denied on December 7, 1983. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1981

" It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioner believes that everything pertinent to a statement of the case is set forth elsewhere in this Petition in the

"Question Presented for Review" and in the "Reasons for the Granting of a Writ of Certiorari" - and in the interest of brevity need not be repeated at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

It is respectfully submitted that in this case the ruling of the courts below, with regard to employee discharges,[1] undertakes to endow mathematical percentages with a potence and consequence which they do not, in logic and reason, have - and which they should not, in law, be given.

As is indicated above, in the "Question Presented for Review", each and every one of the 229 black persons, individually discharged

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[1]The only aspect of this case involved in this Petition for Certiorari is that of employee discharges.

by the Petitioner in the course of its business operations over a period of approximately five years, is by decision, judgment and order in the courts below (5, 55, 184)[1] presently declared entitled to reinstatement and back pay and "front pay" and fringe benefits, plus interest and costs and expenses and attorneys' fees (185-199).

Such ruling has been entered in behalf of these 229 persons without exploration or even inquiry as to the causes or reasons or circumstances of their respective discharges.[2] Indeed, it is a ruling rendered without even a nod of deference in the direction of the

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[1] Unless otherwise indicated, all page references are to the separate printed Appendix which accompanies this Petition.

[2] Except as to two of the total 229 discharged black employees. These two individual exceptions will be hereinafter specifically discussed.

central enactment of the very statute upon which this suit is brought. The entire theme and thrust of this statute, 42 U.S.C. §2000e-2, is individualized. It calls for proof of discrimination against an individual "because of such individual's race". Specifically this statute provides that it shall be "unlawful" . . . "to discharge any individual" . . . "because of such individual's race."

Yet in the present case, the Petitioner is confronted with a drastic judgment and order pertaining to the individual discharges of 227 persons - that is, the 229 referred to above, minus the only two individuals as to whose discharges any testimony or evidence has been brought forward. As has been emphasized, such discharges took place over a period of

years, in numerous and varied individual circumstances.

However, not a word of testimony nor any shred of evidence has been presented with regard to the cause or circumstances of the discharge of any of the 227 individuals. In short, there has been no proof whatever that any one of "such" individuals was discharged "because of such individual's race". It is submitted that the essential and fundamental requirement of the very statute which the plaintiffs invoke has thus been ignored.

In every case under 42 U.S.C. §§1981 and 2000e-2, whether termed a "disparate treatment" case or a "disparate impact" case, it is clear that in the final analysis, intent and purpose to discriminate "because of race" must be proved. It is

so commanded in 42 U.S.C. §2000e-2. If, for example, employees "A" and "B" are of different races, but their employer is totally and genuinely unaware of that and discharges one of them, the employer obviously cannot be held to have discriminated between "A" and "B" "because of" race and therefore cannot be held in violation of 42 U.S.C. §2000e-2.

The Petitioner recognizes of course that, as on any other issue of motive or purpose, an intent and purpose to discriminate "because of race" may be circumstantially and inferentially proved. Such is the situation in cases like Griggs v. Duke Power Company, 401 U.S. 424 (1971), the leading case in the realm of so-called "disparate impact" violations of this statute. There, a certain educational requirement or standard, applied on identical terms to all applicants for

employment, was found to have no relation to the employer's operational needs, but to be, however, to the employer's knowledge clearly more of an exclusionary barrier to blacks than to whites. The use of such a requirement in such circumstances was therefore held to be proof of an intent to discriminate "because of" race.

What the Petitioner is here seeking to emphasize, however, is that in no case under 42 U.S.C. §2000e-2 - whether it be termed a "disparate impact" or a "disparate treatment" case - can plaintiffs succeed without proving intent or purpose on the part of the employer to discriminate against plaintiffs "because of" their race. Since there has been here, with regard to the individual discharges of the 227 former employees, no testimony or evidence which

even addresses this proof requirement of the statute, it remains to examine just what evidence does the judgment in behalf of these 229 individuals purport to stand upon.

The evidence upon which the plaintiffs place their reliance consists of a brief tabulation showing, as hereinabove stated in the "Question Presented for Review", that during the years here in question the defendant Company discharged 586 white employees and 229 black employees, and that the proportion of white employees who were discharged was 21 percent and the proportion of black employees who were discharged was 37.2 percent (108-109). There was thus a numerical imbalance or disparity, in that the percentage of discharges among the black employees was

16.2 points higher than was the percentage of discharges among the white employees.

But how do these figures prove that any black employee was discharged "because of such individual's race"? Above all - and more to the point of the present case - how do these figures establish that each and every black employee discharged at this Company over a period of five years must be legally presumed to have been discharged "because of" his being a black person?

The Court below, upon learned statistical analysis, concludes that "the disparity between black and white" discharge percentages "was not due to chance, but instead to some other cause" (41). The Petitioner certainly agrees with that statement - except that the phrase "other

cause" would be more likely accurate if expanded to read "other cause or causes". In its next sentence, however, the Court takes a quantum leap and declares - "That cause is presumed to be unlawful discrimination".

It is certainly not the Petitioner's position or contention that "chance" determines discharges in its operations. It is the position and contention of the Petitioner that it discharges employees for causes arising out of the efficiency and productivity needs of its business. Its understanding is that under the jurisprudence of this Nation, it is not to be legally presumed to have discharged any person for other and unlawful reasons unless proof has been presented that it has done so. Proof has not been so presented as to any of the 227 individuals involved in this case.

Why or wherein does logic or reason or law call for a presumption that imbalance or disparity "between black and white" discharge percentages is due to "unlawful" cause and not to any other and lawful cause or causes of discharge? Beyond that, the Petitioner would respectfully ask do not logic and law and common sense alike reject the incredible presumption which has been declared in this case, namely, that <u>each</u> and <u>every</u> black employee discharged by this Company over a period of five years was discharged "<u>because</u>" he or she is a black?

Perhaps recognizing the anomalies of this situation, the court below says that the "statistical evidence" of imbalance, as between the "black and white" discharge percentages, is "sufficient to support" the legal presumption here in question "when

combined with the specific instances in which" the Company's discharge or disciplinary "discretion was unevenly exercised" (41). Yet when these "specific instances" are examined, they turn out to be vague and conclusionary statements by a single witness to the effect that there had been warnings or disciplines to black employees for tardiness or absence, while white employees had not been warned or disciplined for even worse tardiness or absence. The witness did not state whether he knew of such instances of his own knowledge or by rumor or hearsay. Such evidence would seem to be meager contribution indeed toward a case of any nature against this Company.

The record shows that the only "instances" of any asserted wrongdoing on the part of the Company regarding any

disciplinary or termination matters is that of the discharges of the two employees hereinabove referred to. The Court of Appeals refers to these two discharges as "instances in which" the Company's discretion "was unevenly exercised" as between blacks and whites (41). Yet neither of these discharges involved any showing whatever that in similar circumstances a black employee was discharged and a white employee was not discharged.

The Company presented full explanation and evidence as to why it discharged each of the two black employees, but it realizes that it can hardly expect this Court, at its level, to reexamine the details and merits of the discharge of these individuals. What the Petitioner does urge is that no matter the outcome of those two individual cases, they

cannot rightly or justly be given any effect of establishing a legal presumption that the Company discharged 227 other black employees - as to none of whom have the courts below either seen or heard one word of evidence regarding the circumstances and causes of their respective discharges.

The "imbalance" concept being in truth the ground upon which the courts below have undertaken to declare a legal presumption that each and every one of the 227 black employees individually discharged by the Company over a period of five years was discharged "because" he or she was a black, it remains to consider the further startling consequences of this concept. Under such a ruling, the only way that an employer, employing persons of different races, can avoid being in violation of

Federal law is by constantly and carefully seeing to it that there is no significant imbalance whatever in the numbers of the persons of different races whom he deals with in any aspect of employer-employee matters - whether in hirings, promotions, discharges or what not.

This is so because 42 U.S.C. §2000e-2 applies alike and with absolute impartiality to persons of each and every race. Thus, for example, in every operation employing both black and white persons, if significant imbalance develops adversely to whites, whether in hiring or promoting or discharging, the employer would be in violation of law - just as truly as if such imbalance developed adversely to blacks in any of these respects. Similarly, if for example, imbalance developed adversely

to whites in hirings, and adversely to blacks in promotions, and then adversely again to whites in discharges, the employer would have become hopelessly entangled in "imbalance" violations of Federal law.

Such a situation may seem - and indeed is - absurd. Nonetheless, it follows logically and inevitably from the theory upheld in this case, namely, that numerical imbalance as between races in any aspect of employer-employee relations creates legal presumption of employer liability to each and every person on the adverse side of the imbalance.

It is obvious that the subject of proof under 42 U.S.C. §2000e-2 is, as exemplified by the rulings of the courts

below in this case, in a state of serious disarray which needs and requires correction and guidance from this Court.

Upon all of the foregoing, it is respectfully submitted that this Petition for Certiorari should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1831

Paul Lilly, etc., et al. — Appellees,

and

Philip Reed, et al, — Plaintiffs.

versus

Harris-Teeter Supermarket, a corporation, — Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

Upon consideration of the defendant-appellants' petition for rehearing and suggestion for rehearing in banc, and no judge having requested a poll on the suggestion for rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Sprouse, and Judge Kellam.

FOR THE COURT,

s/ WILLIAM K. SLATE, II
CLERK

FILED
DEC 7 1983
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1831

Paul Lilly, individually and on behalf of all others similarly situated, Christopher McKinney, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Jerome Gary, Curtis Jones, Roy Torrence, John Johnson, Willie Hunt, Roosevelt Patterson, Willie Covington, Michael McVay, Richard Gregory, individually and on behalf of all others similarly situated, Edward Porter, individually and on behalf of all others similarly situated,

Appellees,

and

Phillip Reed, Shirley Gatewood, Woodrow McManus, Hazel Fisher, William Carrothers, Tresevant Goodwin, Richard Burch, Mack Ervin, Barbara Anderson, Austin Pharr, Therrell McMoore,

Plaintiffs,

v.

Harris-Teeter Supermarket, a corporation,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. C/A C-C-76-191; C-C-79-130; C-C-79-137

Argued April 12, 1983

Decided October 14, 1983

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and KELLAM,* District Judge.

John O. Pollard (Richard F. Kane, Blakeney, Alexander & Machen on brief) for Appellant; Michael A. Sheely (Sheely and Blum on brief) for Appellees.

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* Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

WINTER, Chief Judge:

In this class action charging racial discrimination in employment, Harris-Teeter Super Markets, Inc., (Harris-Teeter) appeals from a judgment of the district court entered upon findings that it had engaged in a pattern or practice of racial discrimination in terminations and promotions at its Mecklenburg County, North Carolina warehouse and retail stores, and that it had been guilty of specific instances of racial discrimination against thirteen of the named individual employees. We conclude that the suit was properly certified as a class action with respect to both promotions and terminations, and that various individual plaintiffs were properly permitted to intervene. We affirm the finding of a pattern or practice of racial discrimination in terminations, but reverse the finding of a pattern or practice of discrimination in promotions.

We affirm the judgments of discrimination as to three named plaintiffs, but remand for further proceedings as to the individual plaintiffs alleging discrimination in promotions.

I.

Harris-Teeter is a retail grocery chain with offices, retail stores, and a warehouse located in Mecklenburg County. In January 1975, Harris-Teeter discharged Paul Lilly, a black warehouse employee. Lilly filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that he had been discharged for protesting racially discriminatory treatment on the job and that Harris-Teeter was engaged in systematic discrimination against blacks in its termination practices. Lilly later amended his EEOC charge to include allegations of systematic discrimination against blacks in hiring, promotions, personnel procedures,

terminations, and supervisory practices. Lilly was subsequently issued a right-to-sue letter by EEOC and, in June 1976, he commenced the present action.

Lilly's complaint, brought under both 42 U.S.C. §§ 1981 and 2000e et seq., alleged that he had been terminated because of his race and in retaliation for protesting racial discrimination. He also claimed to represent a class of black Harris-Teeter employees who, from July 1974 on, had suffered racial discrimination in hiring, promotions, interviewing, terminations, supervision, and discipline. In support of his subsequent motion for class certification, Lilly presented statistical evidence purporting to show disparities in job classification and cited specific examples of alleged discrimination in promotions and terminations. The district court thereupon

tentatively certified the class as requested.

In April 1979, twenty black Harris-Teeter employees filed a joint motion for permission to intervene as plaintiffs, in order to present their individual claims of racial discrimination. The claims of these individuals encompassed alleged discrimination in terminations, promotions, job placement, pay, and transfers. Although none of these individuals had exhausted their administrative (EEOC) remedies, the district court granted the motion for joint intervention. In addition, the district court consolidated the case with those of two other black Harris-Teeter employees, Gregory and Porter, who were alleging racial discrimination in demotions and hiring, respectively. Gregory and Porter had exhausted their EEOC remedies prior to filing their individual

suits. Subsequently, the district court certified all twenty intervenors and Gregory as class representatives.

A bench trial was held from January through March, 1980. In August, 1980, the district court filed a "Memorandum of Decision," in which the court found a generalized pattern of racial discrimination in hiring, promotions, and terminations. As practices that effectuated this discrimination, the court found that there were no written job descriptions, promotion criteria, job evaluations, or list of employees wanting to change jobs, that job openings were not posted, that the company rule that limited eligibility for promotions to employees in the same department and shift as the opening was strictly enforced as to blacks but not as to whites, that refusals by blacks to

take on jobs were carefully remembered, although they were never asked if they had changed their minds, and that claimed previous job experience of blacks was either forgotten or disbelieved, while that of whites was credited and utilized. The district court also found that the statistical evidence broadly supported the court's conclusion from the individualized testimony that blacks had less chance of getting good jobs and promotions than did whites. The district court, in addition, found that individual instances of discrimination had been demonstrated as to fourteen of the named plaintiffs, but not as to the other ten. Finally, the district court instructed plaintiffs' counsel to prepare proposed findings of fact and conclusions of law as to the class-wide issues and as to the prevailing individuals; defense counsel were

instructed to do likewise for those individuals found not to be entitled to relief.[1]

Plaintiffs' counsel subsequently submitted lengthy proposed findings of fact and conclusions of law; the district court requested that they be condensed and invited defense counsel to comment on the proposed opinion. Defendant chose not to do so. Plaintiffs then submitted a revised draft. The district court returned this draft to plaintiffs in marked-up form, instructing them to incorporate various editorial changes and to reverse the previous finding of discrimination as to one of the intervenors. Although this was the only major substantive change, notations on the marked-up draft show that the district court checked the proposed findings of fact against the

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[1]Defendant's proposed opinion as to the ten unsuccessful plaintiffs was subsequently adopted by the district court and is not contested on appeal.

testimony in the record and approved each paragraph individually. The district court, in returning the draft, again requested that defendant submit any comments on or objections to the proposed opinion. Defendant once again chose not to do so. The proposed opinion, as amended, was then adopted by the district court.

In that final opinion, the district court first made permanent its class certification order. It found that the claims of persons alleging discrimination in promotions and terminations were sufficiently similar to justify single-class treatment.[2]

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[2]In its judgment entered July 12, 1982, the district court certified the class as:

> Plaintiffs Lilly, Gregory, Reed, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Johnson, Gatewood, Sullivan, Bailey and LeGrand; and all blacks currently employed by Harris-Teeter at its warehouse and store numbers 1, 2, 5, 8, 9, 22, 39, 52, 53, 55, 59, 62, 66, and 83, located in Mecklenburg County; and all blacks employed by Harris-Teeter at

The district court excluded from the certified class, however, employees at the company's offices and employees alleging discrimination in hiring for lack of proper class representatives. As to the merits of the terminations claim, the court found that the supervisory force was overwhelmingly white and exercised virtually unlimited discretion, in that the only written statement of Harris-Teeter's termination policy was a list of "don'ts" whose violation might or might not be grounds for an indeterminate amount of discipline. The district court then found that both the statistical data, which showed that the actual number of blacks involuntarily terminated for cause from 1974

(cont.)

> [said warehouse and stores] at any time since July 20, 1974 who are not currently employed, all of whom may have been or may be subjected to racial discrimination by Harris-Teeter in its employment policies and practices in reference to terminations and promotions.

through 1978 was almost ten standard deviations above what would be expected from their proportion of the workforce, and the testimony at trial, which revealed several instances in which blacks had been terminated while equally or even more serious misbehavior by whites had been tolerated, demonstrated that this unlimited discretion had been exercised in a racially discriminatory manner. Finding no satisfactory explanation from Harris-Teeter for the statistical disparities and crediting the direct evidence of discriminatory treatment, the disrict court concluded that Harris-Teeter had engaged in a pattern or practice of racial discrimination in its terminations policy.

As to the merits of the promotions claim, the district court again found that the overwhelmingly white supervisory force had wielded unlimited discretion, in that there were no written job descriptions or

regular system of job performance evaluation, job posting was begun only in 1979, and the promotions criteria (such as "attitude" and "initiative") were vague and subjective. The district court then found that both the statistical evidence, which showed that the black promotion rate was less than 70 percent of the white promotion rate, and the direct testimony revealed that this discretion was discriminatorily exercised. The court rejected Harris-Teeter's explanations, ruling that the company's "same department/same shift" policy had been applied only to blacks, that only the refusal by blacks to take certain jobs was remembered and held against them, although they were never asked if they had changed their minds, and that previous job experience of blacks was ignored or disbelieved while that of whites was utilized. In addition, the district court found, on the basis of

statistical data, that the number of blacks hired by Harris-Teeter was some five to seven standard deviations below what would be expected from their proportion of the available pool of applicants, and that this evidence of discrimination in hiring supported the conclusion that Harris-Teeter discriminated in promotions. On the basis of all of this evidence, the district court concluded that Harris-Teeter had engaged in a pattern or practice of racial discrimination in its promotions policy.

The district court then proceeded to examine the individual discrimination claims of the named plaintiffs. In each case the court applied the analytic framework specified in Texas Department of Community Affairs v. Burdine, 450 U.S. 248

(1981).[3] The court found that Harris-Teeter had discriminated on the basis of race as to Porter (hiring), Reed, Mobley, McKinney, Torrence, Patterson, Jones, Sullivan, Bailey, and LeGrand (promotions), Gregory (demotion), Gary (promotion and transfer), and Lilly (termination). The district court then entered judgment, ordering Harris-Teeter to reinstate or offer promotions to the prevailing named plaintiffs and to establish less discretionary systems of promotions and terminations, referring the case to a special master for the determination of back pay for the named plaintiffs and of

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[3]Under Burdine, plaintiff must first establish a prima facie case of discriminatory treatment, defendant must then articulate a legitimate, non-racial reason for its practices, next the plaintiff must be given the opportunity to prove that the defendant's explanation is pretextual, and then the court must decide, based on all the evidence and with the ultimate burden of persuasion on plaintiff, whether the challenged treatment was based on intentional racial discrimination.

appropriate relief for the class members, and ruling that plaintiffs' counsel was entitled to an award of attorneys' fees. As to this final point, the district court thereupon entered an award of approximately $86,000 in interim attorneys' fees.

Harris-Teeter now appeals from the findings of liability on the issues of class-wide discrimination as to both promotions and terminations and individual discrimination as to each named plaintiff and from the amount of the interim attorneys' fees award.

II.

Harris-Teeter first argues that the district court failed to meet its obligation under Federal Rule of Civil Procedure 52(a) to "find the facts specially and state separately its conclusions of law thereon" when it adopted essentially verbatim the proposed opinion prepared by plaintiffs' counsel. We cannot accept this disingenuous argument.

It is true, of course, that we repeatedly have cautioned district courts against the practice of simply adopting findings prepared ex parte by one of the litigants. See, e.g., EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 639-41 (4 Cir. 1983) (citing cases). As we stated in Federal Reserve, "the findings must be based on something more than a one-sided presentation of the evidence, . . . [because] finding facts under Rule 52(a) requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both." Id. at 640. In the present case, however, the district court twice specifically requested that defense counsel submit comments on, and objections to, the findings of fact and conclusions of law submitted by the plaintiffs, and defendant never responded. That the presentation was

one-sided is therefore attributable not to the district court's procedure, but rather to defendant's own choice. We note, in addition, that the district court reversed its initial finding as to one intervenor during its review of the proposed opinion and that it checked the cited evidence in the proposed findings against the actual trial transcript, approving each paragraph of the findings one by one. Under these circumstances, we do not think that defendant's argument that the district court failed to meet its responsibilities under Rule 52(a) is well taken.

As a matter of general practice, however, we do not approve of the issuance by the district court of a memorandum of its ultimate findings in sweeping terms followed by a request to the parties to prepare detailed findings as to the issues upon which each side prevailed. The proper practice is for

the district court, prior to reaching and announcing any decision, to request proposed findings from both parties as to all of the disputed factual and legal issues, preferably with references to the record supporting the fact requested to be found, and then to prepare its decision based upon its analysis of these proposed findings and the evidence of record. By utilizing this procedure, the district court can be certain of obtaining -- and not merely of having requested -- both parties' views on each disputed issue and their citation to evidence on both sides of each factual question. In all future cases in which the district court concludes to request proposed findings from counsel, this latter method should be followed.

III.

Harris-Teeter next argues that the district court erred in certifying this case

as a class action with respect to both terminations and promotions.[4] As to the former, Harris-Teeter contends that although Lilly would have been an adequate representative for a class of discharged black employees who similarly, in connection with their discharges, suffered racial discrimination violative of both § 1981 and Title VII, the existence of such a class was never demonstrated. In particular, Harris-Teeter argues that Lilly never showed any facially neutral termination policy that had a "disparate impact" on blacks and that, with respect to possible "disparate treatment," Lilly alleged only a few isolated instances of discriminatory treatment.

The prerequisites to class certification under both Title VII and § 1981 are

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[4]Harris-Teeter concedes in both cases that if the prerequisites of Rule 23(a) were met, these claims were properly maintainable in class action form under Rule 23(b)(2).

those generally applicable under Federal Rule of Civil Procedure 23(a). See General Telephone Co. v. Falcon, 457 U.S. 147 (1982) (Title VII); Stastny v. Southern Bell Tel. & Tel. Co., 628 F. 2d 267 (4 Cir. (1980) (Title VII); Gonzalez v. Southern Methodist University, 536 F. 2d 1071, 1072-73 (5 Cir. 1976) (§ 1981), cert. denied, 430 U.S. 987 (1977). Therefore, plaintiffs need not, at the time of the motion for class certification, demonstrate by statistical evidence that blacks have been terminated at a higher rate than have whites, or any other differential. Certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims (and, as were conceded here, the adequacy of Lilly and typicality of his claim). As to the commonality requirement, the complaint plainly alleged a

practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged black employees. And as to the numerosity requirement, the statistics at trial[5] revealed that 229 black employees were involuntarily terminated from 1974 through 1978, easily enough to demonstrate the existence of a class. We conclude, therefore, that the class with respect to terminations, under both § 1981 and § 2000e, was properly certified.

As to the propriety of certifying that class to include persons discriminated against with respect to promotions, Harris-Teeter contends that these claims should not

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[5]It is true that the numerical evidence presented at the time of tentative class certification did not reveal how many blacks had been discharged by Harris-Teeter, and therefore the tentative certification may have been improper, but the numerical evidence at trial, as discussed in the text, satisfied the numerosity requirement.

have been included for lack of a proper class representative.[6] Lilly, although limiting his personal claim to alleged discrimination in his termination, claimed in his complaint to represent all black Harris-Teeter employees who suffered racial discrimination with respect to promotions as well, and the district court certified him as such.

Determination of whether Lilly's claim is "typical" of the unpromoted employees' claims is guided by the Supreme Court's recent decision in General Telephone v. Falcon, 457 U.S. 147 (1982), announced subsequent to the district court's decision. In Falcon, the Court rejected the Fifth Circuit's "across the board" rule that an

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[6]Here too the commonality and numerosity requirements were satisfied. The complaint alleged disparate treatment in the promotions decisions, thus raising common questions of law and fact. The numerosity requirement was met by the fact that Harris-Teeter employed some two hundred blacks and promoted over one hundred employees annually.

employee who suffers racial discrimination in any employment practice automatically may maintain a Title VII class action for all company employees as to all discriminatory employment practices. But the Court also rejected those cases that had interpreted its decision in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977), as requiring that the class representative necessarily have suffered discrimination in precisely the same employment practice as did all the other members of the class.[7] Instead, the Court reiterated that each case must turn, based upon its particular facts, on whether the individual Title VII claim of the named plaintiff and the claims of the Title VII class he purports

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[7]This would seem to cast doubt on the continued vitality or sweep of the language of some of our recent cases. See, e.g., Abron v. Black & Decker, Inc., 654 F. 2d 951 (4 Cir. 1981); Hill v. Western Elec. Co., 596 F. 2d 99 (4 Cir.), cert. denied, 444 U.S. 929 (1979).

to represent raise common questions of law or fact.[8]

When Falcon is applied here,[9] it is apparent that Lilly's individual (and class-wide) terminations claim and the promotions claims overlapped on several important pieces of proof: the absence of written, objective criteria for promotions and terminations, the virtual absence of regular job performance evaluations, and the presence

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[8]Such a focus serves two important purposes. First, satisfaction of the commonality requirement ensures that a primary justification for the class action -- efficiency in the adjudication of duplicative claims -- will be present. Hence the emphasis on common issues of proof. Second, commonality of proof serves to assure adequacy of the representation that the absent class members will receive, in that the named representative will have the greatest incentive aggressively to discover and present evidence needed for his own personal claims.

[9]The appropriateness of class certification of a § 1981 claim also depends upon the Rule 23 criteria. See, e.g., Gonzalez v. Southern Methodist University, 536 F. 2d 1071, 1072-73 (5 Cir. 1976), cert. denied, 430 U.S. 987 (1977).

of an overwhelmingly white supervisory force.[10] The Supreme Court recognized in Falcon that these conditions could justify single class treatment for more than one employment practice:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

457 U.S. at 159 n. 15. But plaintiffs' class-wide promotion claim here deviated from a claim of unfettered discretion discriminatorily exercised because of the allegations that defendant put substantial weight on prior work experience and that defendant treated blacks and whites differently in terms of believing and utilizing

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[10] Unfortunately, it is not wholly clear from the record whether the supervisors who made the decisions regarding promotions were the same people who made the decisions regarding terminations.

that prior work experience. There was also an indication that the discretion in promotions was further limited by a "same department/same shift" policy, which was alleged to have been enforced only as to blacks.[11] These charges raised significant issues of proof separate from those evidentiary issues implicated by the terminations claim. Thus, although the question is a very close one, we conclude that the requirements of Rule 23(a) were not met and that Lilly was not a proper representative for those persons discriminated against with respect to promotions under either § 1981 or Title VII.

Plaintiffs argue, however, that even if Lilly could not represent a class

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[11] We of course give this factor less weight because it was largely raised by Harris-Teeter as a justification for certain instances of refusals to promote blacks, rather than by plaintiffs in their certification motion, and because it was regarded by the district court as, arguably, a pretext developed after the fact.

including promotions, eleven of the individuals whose petitions to intervene were granted by the district court were proper representatives for a promotions class. These eleven individuals all advanced individual claims of discrimination in promotions and were certified as class representatives by the district court; eight ultimately prevailed on their promotion claims. In support of this position, plaintiffs cite Muskelly v. Warner & Swasey Co., 653 F. 2d 112 (4 Cir. 1981), which approved the intervention of an individual claiming discrimination in hiring into an across-the-board class action brought by another individual whose personal claim involved the employer's allegedly wrongful failure to promote him, in order for the former to become the proper representative of the "hiring" class and to assert

his own hiring claim. In response, Harris-Teeter argues that because these individuals never exhausted their EEOC remedies, the district court never should have let them intervene in the first place.[12]

With respect to this question, we deem it necessary to separate the Title VII claims from the § 1981 claims. As to the promotions claims brought under 42 U.S.C. § 1981, exhaustion of EEOC remedies is not a prerequisite to filing suit. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460-61 (1975). We therefore conclude that the intervenors were properly permitted to intervene with respect to the § 1981 promotions claims, and that they were properly

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[12]Through this argument, Harris-Teeter of course also contends that the individual claims of the intervenors never should have been presented and thus shoud be vacated on appeal.

certified as class representatives for that claim.[13]

We turn next to the propriety of the district court's order permitting the individuals to intervene, prior to exhausting their EEOC remedies, in order to present individual claims of, and to represent a class asserting claims of, discrimination in promotions in violation of Title VII. The district court's order permitting such intervention was based on the rule established in Oatis v. Crown Zellerbach Corp., 398 F. 2d 496, 498 (5 Cir. 1968), that class members may intervene in a Title VII suit without having exhausted their EEOC

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[13]Although the § 1981 promotions claims of the intervenors and the class they represented were not, therefore, proper until April of 1979, the statutory time limit for filing these claims was tolled by the existence of Lilly's lawsuit in which promotions were contained in the putative class. See American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974); Crown, Cork & Seal Co. v. Parker, 51 U.S.L.W. 4746 (1983).

remedies. But because we have concluded that the class represented by Lilly should not have been certified to include promotions, these individuals were not class members at the time they sought to intervene. Thus, their intervention cannot be premised on the rule from Oatis relied upon by the district court.

Alternatively, it is suggested that intervention to assert promotion claims under Title VII, without exhaustion, was proper under the rule from Foster v. Gueory, 655 F. 2d 1319, 1321-23 (D.C. Cir. 1981). Foster held that individuals who are not class members may intervene in a Title VII suit without exhausting EEOC remedies if their claims are so close to the named plaintiff's claim that no further purpose would be served by requiring exhaustion.[14] The

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[14]See also Spirt v. Teachers Ins. & Annuity Ass'n, 93 F.R.D. 627, 641-42 (S.D.N.Y. 1982).

question, said the Foster court, is whether the

> two claims are so similar that it can fairly be said that no further conciliatory purpose would be served by filing separate EEOC charges [or whether] the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only in the courts.

Id. at 1322.[15]

In the present case, Lilly's exhausted EEOC charge alleged discrimination by Harris-Teeter in promotions as well as in terminations, hiring, personnel procedures, and supervisory practices. Gregory and Porter, whose cases were consolidated with the class

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[15] Cf. Hill v. Western Elec. Co., 672 F. 2d 381, 390 n. 6 (4 Cir.) (suggesting that intervention by persons claiming discrimination in hiring, who had not exhausted EEOC remedies at the time the class action was filed by an individual claiming discrimination in promotions, was proper if the employer had, by the time the suit was filed, been given fair notice of, and opportunity to resolve through conciliation, the hiring claim), cert. denied, 74 L. Ed. 2d 294 (1982).

action, had exhausted their EEOC remedies with respect to their claims of discrimination in demotions and hiring. Under these circumstances -- with EEOC remedies as to termintion, demotions, and hiring claims exhausted, with Lilly's EEOC charge including promotions, and with no indication that any discrimination claims against the company could be settled out of court -- we think that exhaustion by the intervenors of EEOC remedies with respect to promotions would have been futile. Although the claims are not precisely the same and cannot, as we have indicated, comprise a single class, we think that they are sufficiently similar so that it fairly can be said that the failure successfully to conciliate the three exhausted claims foreshadows an inevitable lack of success in conciliating the promotions claim. We therefore conclude that exhaustion of EEOC remedies was excused for

the intervenors and that their intervention was proper. Since eleven of these intervenors were proper Title VII class representatives for a class of persons discriminated against in regard to promotions, we conclude that the Title VII promotions claim ultimately was properly certified as a class action.[16]

IV.

Harris-Teeter's next challenge is to the sufficiency of the evidence of a pattern or practice of racial discrimination with regard to both terminations and promotions. As to the former, plaintiffs' statistical evidence showed that blacks comprised, on average, 15.7 percent of the Harris-Teeter workforce from 1974 through 1978, but represented over 28 percent of the involuntary

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[16]Because Lilly's filing suit of a class purporting to include promotions tolled the limitations period, these claims were timely filed. See supra note 13.

terminations during that period. Statistical analysis of the data underlying this disparity revealed that the number of involuntary "for cause" terminations of blacks was, over this period,[17] 9.71 standard deviations (by the binomial model[18]) greater than

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[17]If possible, it is highly preferable to examine the statistical data for the time period in combined form, rather than year by year. Combined data is more likely to demonstrate the "pattern or practice" of defendant's policies, whether discriminatory or not. Moreover, by increasing the absolute numbers in the data, chance will more readily be excluded as a cause of any disparities found. For example, if a coin were tossed ten times in the first day and came up heads four times, no one would think the coin was biased (0.632 standard deviations), but if this same ratio occurred for a total of 10,000 tosses, of which 4,000 were heads, the result could not be attributed to chance (20 standard deviations).

[18]As we have touched upon previously, there are two common models of statistical analysis: the binomial model and the hypergeometric model. See EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 650 (4 Cir. 1983). The binomial model is appropriate where the "selection" (i.e., hiring, promotion, or termination) of the individuals does not significantly alter the racial composition of the pool from which future selections are to be made. This would be true,

would be expected on the basis of chance.[19] Under the test discussed in EEOC v. American

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(cont.)
for instance, in selecting 50 people to be hired for unskilled work from a large city, because making the selection will not, even if all those chosen as the process goes along are white, significantly affect the racial composition of the applicant pool. The hypergeometric model, on the other hand, is appropriate where the selections could significantly alter the racial composition of the pool from which future selections are to be made (that is, a finite pool). An example of this would be a situation in which 10 managers are to be promoted from a group of 30 foremen, of whom half are black and the other half white. The key distinction here is that the selection of a white for the first position will significantly alter the racial composition of the selection pool, from 15 of 30 (.500) to 15 of 29 (.517) black. Thus, if another white is chosen, the inference of discrimination will properly be heightened. See Peterson, Binomial v. Hypergeometric Employee Selection Models, 2 Personnel Research Report 1 (April 1983).

The binomial process is probably appropriate here because although the pool of persons who can be terminated is fixed at any given time, it is an open pool when examined over a five year period, as here, in that new employees will be hired and then themselves be subject to termination.

[19]Under the binomial model,

n = total employees terminated

National Bank, 652 F. 2d 1176, 1190-93 (4 Cir. 1981) (citing Hazelwood School District v. United States, 433 U.S. 299, 311 n. 17 (1977), and Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977)), cert. denied, 74 L. Ed. 2d 186 (1982), because the number of standard deviations was more than two or three, this statistical evidence conclusively ruled out chance as the cause of the

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(cont.)
p = black percentage of the workforce
1-p = white percentage of the workforce
Q = actual number of black terminations
E = expected number of black terminations = np
s = standard deviation = $\sqrt{np(1-p)}$
number of standard deviations = (Q-E)/s

Here, n = 815, p = .1572, 1-p = .8428,

Q = 229, E = np = 128.12
s = 10.39, and the number of standard deviations = 9.71

disparity in the termination rates.[20]

In addition to this statistical evidence, the district court found that Harris-Teeter's terminations policy was highly discretionary[21] and had in specific instances been applied unevenly to blacks as against whites. The district court credited testimony that whites received disciplinary warnings, if at all, only after extensive absences or tardiness, while blacks, including Lilly, were terminated for insubstantial

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[20]By conclusively ruling out chance as the cause of the disparity in the termination rates, plaintiffs thereby made out a prima facie case of class-wide discrimination, thus shifting the burden to Harris-Teeter to come forward with a credible lawful explanation for the disparity.

[21]The fact of this discretion is itself relevant. See Sledge v. J. P. Stevens & Co., 585 F. 2d 625, 635 (4 Cir. 1978) ("where [strong statistical] proof is coupled with evidence that the defendant based hiring and other employment decisions upon the subjective opinions of white supervisors, the trial court is entitled to infer, as it did here, that the defendant illegally discriminated"), cert. denied, 440 U.S. 981 (1979).

reasons. We think that the strong statistical evidence, when combined with the specific instances in which the discretion was unevenly exercised, is sufficient to support the district court's finding that Harris-Teeter engaged in a pattern or practice of racially discriminatory treatment of blacks in connection with its terminations policy.[22]

We turn next to the sufficiency of the proof of class-wide racial discrimination in promotions. The district court found that in 1976 the combined black promotion

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[22] Harris-Teeter advanced no explanation for the disparity between the black and white termination rates, instead arguing that the plaintiffs' statistics "showed only that both blacks and whites had committed dischargeable offenses and had been discharged." That assertion is plainly incorrect, for the standard deviation analysis demonstrates that the significant disparity between the termination rates was not due to chance, but instead to some other cause. That cause is presumed to be unlawful discrimination until the defendant shows otherwise, see supra note 20, and Harris-Teeter failed to do so here.

rate in the stores and warehouse was 69 percent of the white promotion rate, and that in the stores alone the black promotion rates for 1975 and 1976 were 70 percent and 67 percent, respectively, of the white promotion rates. The first problem with this data, however, is that its scope -- covering the stores and warehouse for only 1976 and only the stores for 1975 -- is insufficient to prove discrimination from 1974 through 1978. Second, when additional, uncontested data from the record is added into the overall numbers, the black promotion rate rises to 86% of the white rate.[23] Moreover, a statistical disparity cannot, standing alone, make out a prima facie case of classwide discrimination unless a standard deviation analysis has ruled out chance as the

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[23]The promotions data for the warehouse in 1975, available in the record, showed that more blacks were promoted than would be suggested by their proportion of the workforce. See infra note 24.

cause of the disparity. When such an analysis is performed on the promotions data, it appears that the number of blacks promoted is fewer than two standard deviations below what would be expected from their proportion of the workforce; thus chance is not excluded as the cause of the disparity.[24]

In an attempt to demonstrate that discriminatory intent rather than chance was the cause of the disparity in the promotion rates, plaintiffs submitted statistical evidence demonstrating that fewer blacks were hired by Harris-Teeter than would have been expected from their proportion of the applicant pool. Standard deviation analysis of this data conclusively ruled out chance as the cause of the disparity in the hiring rates, thus raising a presumption that discriminatory intent was the explanation for the hiring disparity. The district court

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[24]See page 54 of this Appendix.

accepted this as being probative of a similar intent behind the disparity in the promotions data. On the present record, however, we cannot accept this analysis. We agree that evidence of discriminatory intent in one employment context (e.g., hiring) may be probative of discriminatory intent in a different context (e.g., promotions) where it has been demonstrated that the same company managerial personnel were responsible for decisionmaking in both contexts. In the present case, however, the district court made no finding that the store supervisors responsible for promotions were also responsible for hiring.[25] We therefore conclude

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[25]Although ultimate formal responsibility for hiring, promotions, and terminations all rested in the district managers, the district court found that these managers adopted almost automatically the recommendations of the supervisors at the stores. There was no evidence that the district managers instructed or encouraged the store supervisors to make recommendations that were influenced by racial discrimination.

that the inference of discrimintory intent with respect to hiring should not have been considered in determining whether discriminatory intent was the cause of the disparity in the promotions data.

The other factor relied upon by the district court to demonstrate an intentionally discriminatory pattern of racial discrimination was the testimony of the nine intervenors who prevailed on their promotion claims. But almost none of this testimony related to instances of direct racial discrimination, and there certainly were too few instances of direct discrimination from which any pattern or practice of such discrimination could be inferred. Instead, most of the testimony dealt with the absence of written, objective criteria for promotion decisions. As we have noted, supra note 21, the possession by mangement of unbridled discretion will tend to confirm implications

of racial discrimination drawn from statistical disparities. But here the promotions data did not reveal any statistically significant disparity between the black and white promotion rates. Thus, because Title VII and § 1981 prohibit racial discrimination, rather than simple arbitrariness or caprice, the mere existence of vague and subjective criteria is not alone proof of unlawful discrimination. The district court's finding of class-wide discrimination with respect to promotions therefore cannot stand.

V.

Harris-Teeter next challenges the district court's findings as to each of the thirteen named plaintiffs who prevailed. We turn first to the ten plaintiffs -- Mobley, Reed, Gary,[26] McKinney, Torrence, Patterson, Jones, Sullivan, Bailey, and LeGrand -- who alleged that they had been denied

promotions because of racial discrimination. We conclude that, in light of our reversal of the district court's finding of class-wide discrimination in promotions, these cases must for two reasons be returned to the district court for further proceedings. First, in each instance, the district court appears to have grounded its conclusion, at least in part, on its earlier finding that the promotions system was, as a whole, discriminatorily applied as to blacks. Because the district court did not indicate explicitly whether this finding was a necessary, or merely a cumulative, piece

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[26]We also include here the "transfer" claimed by Gary, because the district court appears to have treated this claim along with Gary's promotion claim, and because Gary testified that this "transfer" would have included a pay raise, indicating that it too was actually a claimed promotion.

of evidence, we must remand to the district court for a determination of whether any or all of the individual claims are made out in the absence of proof of class-wide discrimination. Second, the district court made no case-by-case findings as to the "subjective" criteria advanced by Harris-Teeter as the basis for its promotion decisions. As noted above, the district court may, where the statistical data reveals a disparity between the white and black promotion rates of sufficient magnitude to warrant an inference of discrimination, conclude that the subjective criteria do not overcome that inference. But the premise that the subjective criteria were mere pretexts for racial discrimination cannot stand as an across the board conclusion where, as here, the existence of class-wide discrimination is not demonstrated. Rather, the district court must, on a case-by-case

basis, determine whether the subjective criteria advanced by Harris-Teeter were in fact utilized in making the individual decision, or whether the individual decision was based upon unlawful discrimination.

The district court next found that plaintiff Lilly had proven that his discharge from Harris-Teeter was based on racial discrimination. We agree. The evidence revealed that Lilly was discharged only two days after complaining about racial discrimination to Harris-Teeter's personnel director. Further, although Harris-Teeter claimed that Lilly's job performance in quantity checking had been deficient, it never introduced any written substantiation of these claims, and Lilly's supervisor admitted that he never checked as to whether the errors in counting might have been at the receiving end. Under these circumstances, the district court did not clearly err in

rejecting Harris-Teeter's purported justification and in finding that Lilly had been the victim of racial discrimination.[27]

Next, the district court found that Richard Gregory's demotion and subsequent constructive discharge were based upon racial discrimination. The district court credited testimony that Gregory was assigned duties not given to whites at his level, that his termination of a white employee who had called him a "nigger" was reversed by his superiors, and that his job performance had been praised. Further, the district court noted that although Gregory had been discharged by a black, that was done on orders by, and in the presence of, a white territorial supervisor. We thus conclude

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[27]This conclusion is buttressed by the overwhelming statistical disparity between the black and white discharge rates, which proves class-wide racial discrimination in terminations.

that the district court's finding was not clearly erroneous.

The final individual claim decided by the district court was that of Edward Porter, who challenged Harris-Teeter's decision not to hire him as a tractor-trailer driver. The evidence showed that whites with less experience than Porter were hired by Harris-Teeter after he applied for the position. Harris-Teeter contended that they were hired instead of Porter because they came to the company when openings were available, but the district court found that, in at least one instance, Harris-Teeter had filled a subsequent position with a white who had applied before Porter, thus revealing that Harris-Teeter maintained, and utilized, its list of applicants on file. Moreover, the company's asserted statistics as to the percentage of black drivers are meaningless in the absence of data as to the pool of

applicants for the positions. The district court's conclusion as to Porter is therefore also not clearly erroneous and will be sustained.

VI.

Harris-Teeter's final contention challenges the amount of the attorneys' fees awarded to plaintiffs' counsel. Under our opinion in Anderson v. Morris, 658 F. 2d 246 (4 Cir. 1981), one of the factors to be considered in determining the amount of the award is the result ultimately obtained. Because we have concluded that the finding of class-wide discrimination in promotions must be reversed, and that the individual promotions claims must be considered further, we vacate the award of attorneys' fees and remand this issue to the district court for a determination of what effect, if any, these changes in the ultimate result of the

case should have upon the amount of the award.[28]

AFFIRMED IN PART;

REVERSED IN PART;

AND REMANDED.

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[28]We reject, however, several of Harris-Teeter's other objections to the attorneys' fees award. First, the results obtained are merely one factor to be considered by the district court, and the award is not necessarily limited to time spent on issues upon which plaintiffs ultimately prevailed. Second, it is plain that paralegals can be billed at a rate that includes such overhead as rent and secretarial services. Finally, the district court did not err in awarding attorneys' fees for time spent preparing proposed findings. Such a request is perfectly proper and chargeable to the defendant.

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The promotions data, in the form found by the district court and with standard deviations by the binomial method provided, is:

Unit	Year	Employees White	Employees Black	Promotions White	Promotions Black	# Standard Deviations
Ware.+ Stores	1976	1603	284	171	21	1.59
Stores	1975	1191	99	104	6	0.87
Stores	1976	1192	111	129	8	1.12

When adding the additional data metioned in footnote 23, supra, the promotion figures are:

Unit	Year	Employees White	Employees Black	Promotions White	Promotions Black	# Standard Deviations
Ware.	1975	223	192	18	21	-0.96
Ware.+ Stores	1975+ 1976	3017	575	293	48	0.97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-76-191

PAUL LILLY, individually and on behalf of all others similarly situated, Plaintiff, and CHRISTOPHER McKINNEY, PHILIP REED, JOHN LeGRAND, KEN BAILEY, FRANK SULLIVAN, JAMES MOBLEY, SHIRLEY GATEWOOD, JEROME GARY, CURTIS JONES, WOODROW McMANUS, ROY TORRENCE, HAZEL FISHER, JOHN JOHNSON, WILLIE HUNT, MICHAEL McVAY, ROOSEVELT PATTERSON, WILLIE COVINGTON, WILLIAM CARROTHERS, TREVESANT GOODWIN, and RICHARD BURCH, individually and on behalf of all others similarly situated, Plaintiffs-Intervenors, vs. HARRIS-TEETER SUPERMARKET, a corporation, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW

C-C-79-130

RICHARD GREGORY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

C-C-79-137

EDWARD PORTER,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

Michael A. Sheely, Joyce M. Brooks, Sheely and Brooks, 418 Law Building, 730 East Trade Street, Charlotte, NC 28202; Shelley Blum, Raleigh, NC, counsel for plaintiffs.

John O. Pollard, Richard Kane, Blakeney, Alexander and Machen, One NCNB Plaza, Charlotte, NC, counsel for defendant.

Before James B. McMillan, District Judge
Western District of North Carolina
Charlotte Division

Tried January 28-31, February 1, February 19-21, 1980

Non-Jury

Decided: August 15, 1980 by Memorandum of Decision on file.

June 25, 1982 by Supplemental Memorandum of Decison

This is an action brought pursuant to 42 U.S.C. §1981 and 2000e et seq. Mr. Lilly filed his Complaint on June 18, 1976. Subsequent to Motion by plaintiff and the August 3, 1979 Order of the Court, the intervention of Christopher McKinney, Philip Reed, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Shirley Gatewood, Jerome Gary, Curtis Jones, Woodrow McManus, Roy Torrence, Hazel Fisher, John Johnson, Willie Hunt, Michael McVay, Roosevelt Patterson, Willie Covington, William Carrothers, Trevesant Goodwin, and Richard Burch was allowed in

Case Number 76-191. Edward Porter filed his Complaint (Case Number C-C-79-137) on April 27, 1979. Richard Gregory filed his Complaint (Case Number C-C-79-130) on April 25, 1979. Gregory, pursuant to his Motion and Order of the Court, was allowed to intervene in Lilly. All of these cases were consolidated for trial. Plaintiffs sought injunctive relief to remedy allegedly unlawful employment practices and to provide specific relief for each individual who suffered from these practices. Based upon the evidence and exhibits, and after hearing and weighing the evidence, deciding on the credibility of the witnesses, viewing the demeanor of witnesses, considering the interests of witnesses, and the arguments of counsel, the Court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

I. JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5(f).

2. The plaintiffs have complied with the procedural requirements of Title VII (42 U.S.C. §2000e et seq.) (Trial Transcript (hereinafter Tr. _____). _____) 161, 161, 688-690; Plaintiff Trial Exhibits P. E. _____) 17, 27, 28).

II. PARTIES

3. Plaintiffs Paul Lilly, Christopher McKinney, Philip Reed, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Shirley Gatewood, Jerome Gary, Curtis Jones, Woodrow McManus, Roy Torrence, Hazel Fisher, John Johnson, Willie Hunt, Michael McVay, Roosevelt Patterson, Willie Covington, William Carrothers, Trevesant Goodwin, Richard Burch, Richard Gregory, and Edward

Porter are black adult residents of the counties of Orange (Lilly), Lincoln (Reed), Gaston (Porter), and Mecklenburg (remainder), North Carolina.

4. Defendant Harris-Teeter (the "Company" or "defendant"):

(a) is a corporation which transacts business in North Carolina;

(b) is involved in the retail grocery business;

(c) is a person within the meaning of 42 U.S.C. §1981, and an employer within the meaning of 42 U.S.C. §2000e(b). (Tr. 688-690).

III. INTERVENTION

5. Plaintiffs Christopher McKinney, Philip Reed, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Shirley Gatewood, Jerome Gary, Curtis Jones, Woodrow McManus,

Roy Torrence, Hazel Fisher, John Johnson, Willie Hunt, Michael McVay, Roosevelt Patterson, Willie Covington, William Carrothers, Trevesant Goodwin, and Richard Burch filed a Motion to Intervene on April 24, 1979 in Case Number 76-191. Intervenor Richard Gregory filed a separate action (C-C-79-130) and a Motion to Intervene in C-C-76-191.

6. At the time said plaintiffs filed their Motion to Intervene, they were members of the class certified by the July 22,1977 Order of the Court.

7. At the time intervention was sought, and as borne out by the evidence at the trial:

(a) The persons listed in paragraph 5 claimed an interest in the transaction is the subject of Lilly v. Harris-Teeter, Number C-C-76-191.

(b) Disposition of the case may, as a practical matter, impede or impair their ability to protect their interests.

(c) The claims of the applicants have common questions of law and fact with the claims in the existing case.

(d) The allowance of the motions did not unduly delay or prejudice the adjudication of the rights of the original parties.

8. Intervention was sought to state claims under both 42 U.S.C. §1981, §2000e et seq.

IV. EMPLOYMENT PRACTICES

9. Harris-Teeter operates its main office, distribution center (warehouse), and some fourteen retail grocery stores in Mecklenburg County.

10. Between August, 1976, and the trial of this action the defendant's employment practices included: No notices of vacant jobs were posted at any of the locations

before 1979; there were no educational requirements for job positions; there were no written job descriptions; regular written job performance evaluations were limited to office employees, merchandisers, and store managers; there were no criteria as to what factors were to be considered in promotion; and, an employee did not have to ask in order to be considered for promotion at any of the locations (Tr. 540-543, 689-690; Deposition of C. L. Teeter, 27, 33, 36-38).

11. The distribution center (warehouse) has four departments: grocery, meat, frozen food - produce, and transportation. Each department had two shifts. The starting times of various employees on the same shifts are staggered. Both receiving and shipping functions are carried out at the warehouse. Order puller, order selector, order picker, and picker are synonymous terms for the same

position. (Tr. 698-702; Defendant's Trial Exhibit (hereinafter D.E.) 71).

12. A warehouse leadman is a working supervisor who assigns duties and performs the same duties as his subordinates (e.g. a leadman over pickers will assign duties but he has primary duties of a picker). (Tr. 712).

13. The factors utilized in promotion at the warehouse were "character," "integrity," "good sound morale," "correct attitude," and "initiative." These criteria had no written definitions and in each case were defined by the particular management personnel involved in a promotion decision. Those criteria were capable of different definitions. (Tr. 736-41, 918, 987-993; D.E. 75).

14. Mr. Ralph Wilson, a white manager of Distribution Operations, kept a mental list of employees who wanted jobs.

Mr. Penney, a white warehouse manager, maintained a written list of warehouse employees who wanted transfers between December, 1977 and January, 1979. (Tr. 711, 736-741, 1177-1180; D.E. 112).

15. The posting of warehouse jobs started in January, 1979. Leadman jobs were posted in the summer of 1979. (Tr. 711, 736-41).

16. The defendant contended that, in order to be promoted to a warehouse leadman, an employee had to be on the same shift and in the same department as the opening. The defense to the warehouse plaintiffs' promotion claims was grounded on this "same shift/same department" policy/practice. Whether this policy/practice existed during the time periods in question is in dispute. The policy was unwritten (Tr. 928, 990). If the policy existed, it was discriminatorily applied in that: (i) there was no showing that any white person was denied a leadman

position because of the practice; (ii) from the record evidence, only blacks were denied promotions because of the practice; (iii) the policy/practice was used to justify the denial of particular job assignments (Tr. 952); (iv) white employees were promoted or transfered across shift and/or departmental lines to leadman or foreman trainee positions (Weaver, Fowlkes, Givens); (v) more experienced black employees, (Mobley, McKinney, Bailey) all of whom met the same shift/same department requirement, were denied leadman positions some of which were filled by whites who crossed shift and/or departmental lines to fill those positions (Tr. 928, 988-990; Findings 25, 27, 34 infra.)

17. The promotion claims of plaintiffs Mobley, Patterson, Johnson, Sullivan, and LeGrand were defended on the basis of the same shift/same department policy. The

Court finds that this policy was not the reason those plaintiffs were denied promotions (Tr. 110-112, 351-352, 384-385, 520, 917, 918, 928, 933-941, 952-995, 1071; D.E. 81).

18. Refusals by blacks to take jobs on particular occasions, regardless of circumstances, were carefully remembered, but the blacks were never asked whether they had changed their minds or whether their circumstances had changed. See Findings concerning Sullivan (32) and Patterson (29).

19. The defendant contended that some of the whites selected for promotion were better qualified because of their previous job experience (e.g. Allen, Hanson). Previous job experience was not systematically recorded. Relevant job experience of qualified blacks, whether listed on an application form or communicated orally, was often ignored or disbelieved (Reed, McKinney,

Patterson, LeGrand, Torrence). The previous job experience of white promotees was typically rememberd, explored, and utilized (e.g. Hanson). Information concerning prior experience, job performance, etc., was conveyed by word of mouth from one level of supervision to another. In cases where black and white applicants described their previous job experience in a substantially identical fashion, the white applicant's experience was used as a basis for promotion, while the black applicant's experience was ignored. (Tr. 194-195, 513-514, 247-248, 263, 741, 752, 848, 859-862, 864, 868, 752, 1013; D.E. 75, 79, 92).

20. Personnel practices at the retail stores included: Store supervisors (managers) made promotion recommendations by the store supervisor. Promotions were limited to persons recommended by the store managers. The district manager agreed with the

store manager's recommendations 90-95 percent of the time. The district manager ultimately decided who would be promoted, transferred, demoted, hired, or terminated for all positions up to the department-head level. Job vacancies were not posted. Employees transferred from one store to another. In the stores managed by Mr. Higgins (white) (nine stores in Mecklenburg County) there were no black store managers between 1974 and 1977. Between 1974 and 1977, there was no written promotion system, no written description of factors to be considered in promotion decisions, and no regular system of job performance evaluation. (Tr. 784, 838, 853-856, 860).

V. CLAIMS OF PLAINTIFFS

21. Edward Porter, in response to a newspaper advertisement, applied for a tractor trailer driver position at Harris-Teeter on March 31, 1975. Porter's

application listed 22 months of prior experience as a road driver. Porter's other truck experience (ten years) was not listed because he had used up all available space on his application. Porter was neither interviewed nor contacted by Harris-Teeter. Porter was qualified for the driver position. In June, 1975, Porter saw an identical advertisement for tractor trailer drivers. Eight persons were hired as truck drivers between 5/7/75 and 7/24/75, all of whom are white. The first person hired after Porter applied (K. Mills, white) quit on 5/16/75. Harris-Teeter stated it would not rehire Mills. The defendant contends that Porter was not hired because no openings existed when he applied. However, within 120 days of Porter's application, nine whites were hired as truck drivers. Two of the hirees had less driving experience than Porter listed on his application. All of the white

hirees had less driving experience than Porter. The percentage of black drivers decreased from 50.7% in 1975 to 27.6% in 1977. Porter was not hired because of his race. He is entitled to appropriate relief in Stage 2 proceedings (Tr. 6-14; P.E. 27; D.E. 17, 19, 22, 24).

22. Philip Reed presented two promotion claims and a discharge claim. Reed was hired as a produce clerk in 6/76. He had applied for a management position. He had three years of grocery store management experience, including six months in produce management. Reed worked at two stores between 6/76 and 4/77. On several occasions Reed asked the District Manager (Higgins, white) and the store manager (Foye, white) about a promotion to vacant produce manger positions. The first vacancy was filled on 10/8/76 by A. Wilson, white. Wilson, a produce clerk, had 18 months experience with

Harris-Teeter. Wilson, who had no management experience, was replaced by W. Allen, white, on 11/8/76. Allen was selected on the basis of his Harris-Teeter experience as a produce clerk and an assistant produce manager of six months. Reed was not considered for either vacancy. He was more qualified than either of the promotees. Reed received a warning on 12/5/76. It played no part in his nonselection. The Court gives no credence to the reasons advanced by Harris-Teeter for failing to promote Reed. In 1975-76, whites received 96.3% of the promotions in supervisory/management jobs at the stores, and constituted 95% of the officials and managers at the stores. Reed was denied a promotion because of his race. He is entitled to appropriate relief in Stage 2 proceedings. Reed was not discharged because of his race. (Tr. 20-30, 774, 776,

780, 857-859, 861-863, 869; P.E. 5, 23, 26; D.E. 55, 79).

23. Paul Lilly was employed at the warehouse between 7/7/74 and 1/10/75. Within 90 days of his hire, Lilly received two pay raises. Lilly's supervisors were all white. Lilly heard Watson (supervisor) talk about "how he used to kick niggers' asses at the Armour plant before he came to work at Harris-Teeter." Watson denied this (Tr. p. 1107). On 1/8/75, Lilly went to C. L. Teeter, personnel director, and complained that blacks were being terminated for being late while whites laid out and were not terminated. Teeter denied the complaint. Both of these conflicts in the testimony are resolved in the favor of Lilly. On 1/10/75, Lilly was terminated by John Watson for allegedly miscounting beef. Lilly had been given the checking duties as a part of inventory control. After Lilly took over the

checking duties, there was a noticeable improvement in inventory control. Errors in the counting of the beef had been made at the stores. Watson did not check with the stores to see if any errors had been made there. Miscounting the meat was not the reason for Lilly's discharge. Lilly was discharged because of his race and his opposition to racial discrimination. Lilly is entitled to appropriate relief during Stage 2 proceedings. (Tr. 44-59, 67, 70, 71, 73, 87, 88, 1107, 1113, 1114, 1165-66).

24. Richard Gregory worked for Harris-Teeter between 7/7/72 and 5/29/75. Gregory had nine years of previous grocery store experience. Gregory worked as a stock clerk in store number 2 until he was promoted to grocery manager on 5/27/74. As a grocery manager, Gregory's duties were to order merchandise, take inventory, check for shortages, overages, and damage in the

merchandise, make sure that the work area was clean, and keep the shelves stocked. He supervised seven employees. He was not warned about his job performance as a grocery manager. He was informed by his supervisors that he was doing a good job. Gregory terminated a white stock clerk who told Gregory that he was not going to work for a nigger when Gregory instructed him to help unload a truck. The white store manager reinstated the clerk. (A Harris-Teeter witness obliquely denied this. (Tr. 809-10)) Gregory's testimony was corroborated (Tr. 181). The Court resolves the credibility issue in favor of Gregory. On 1/20/75 Gregory was demoted to a stock clerk at another store. Mr. Higgins (white, territory manager) was present when Gregory was told by Mr. Crowell (black, co-manager) that he was being demoted because the storeroom was unclean. Higgins made the decision that

Gregory would be demoted. Gregory was sent to store number 9 as a stock clerk. Gregory left store number 9 as a stock clerk because of the demotion and harassment (e.g. (i) being written up for going to the doctor, (ii) being given more difficult aisles to stock (corroborated by another witness (Tr. 824)), and (iii) being kept later to perform job duties after other clerks went home) (denied by a Harris-Teeter witness (Tr. 833)). This issue of credibility is resolved in Gregory's favor. Gregory was replaced as grocery manager by Donnie Brock, white. After Brock became grocery manager, he was not given aisles to stock. Gregory, as grocery manager, had been asigned aisles to stock. Race was the reason for Gregory's demotion. Gregory was constructively discharged. He is entitled to appropriate relief in the Stage 2 proceedings. (Tr. 153-168, 181, 183-186, 807; P.E. 26).

A white meat manager was "written up" 10 times between March-October of 1976, and was allowed to resign (Tr. 816-822; P.E. 26). The Court specifically credits the testimony of Howard and Pitts (Tr. 176-184) that Gregory performed his job as a grocery manager in a satisfactory manner.

25. James Mobley has been employed by Harris-Teeter since 4/14/74 at the warehouse in the meat department. Milk, dairy products, and meat are in the same department. Mobley's job duties prior to 4/78 included milk picking, unloading, and forklift driving. In the spring of 1976, a foreman (Crowley, white) told Mobley that he was "up" for promotion to leadman in the meat department. Terry Givens (white) received the job on 6/7/76. Givens was initially hired on 1/11/74, resigned 2/5/74 and was rehired 11/3/74. Mobley had more company and departmental experience than Givens.

Givens' prior duties were solely picking meat; Mobley's duties involved more products. Mobley had also supervised Givens when Mobley served as a "fill-in" (temporary) leadman prior to Givens' promotion. Mobley's job performance had been praised by his supervisors. Mobley was never considered for Givens' job. Mitchell, a Harris-Teeter witness, made a comparison between Mobley and Givens (Tr. 926-927). This comparison has little, if any, weight since it was not made at the time of Givens' promotion. Mitchell's assertion that Givens had broader departmental experience is invalid since Mobley acted as Givens' leadman when he was a "fill-in" leadman. On 5/16/77, David Allison, white, was promoted to the meat department vacancy created by Givens' transfer to leadman in the produce department. Allison was hired on 5/18/76 as a picker without forklift duties. Mobley had

both greater company and departmental experience, including that of "fill-in" leadman. Mobley was not considered for the job Allison was promoted to. Jeff Fowlkes, white, was rehired by Harris-Teeter in the warehouse in 5/76. Prior to then, Mr. Fowlkes has worked in various stores. In September or October, 1976, Fowlkes became the "defacto" leadman on the night shift in the produce department; he got the job title on 11/22/76. (Tr. 351-52, 384-85, 520, 933-41, 952-995, 1071; P.E. 26). Harris-Teeter stated that it did not promote Mobley to the Allison position because Mobley was on strike. This reason is not valid since Mobley informed Harris-Teeter he was available for work eight to ten weeks before the Allison promotion. Harris-Teeter stated that it did not promote Mobley to the Fowlkes' position because Mobley was on a different shift in another department and because Mobley was

on strike after 11/16/76. Mobley was present when Fowlkes started his "defacto" leadman duties. Mobley was denied these three promotions because of his race. He is entitled to appropriate relief in Stage 2 proceedings. In April, 1978, Mobley became a meat department leadman. (Tr. 97-116, 125, 384-385, 520, 926-27, 933-41, 995, 996, 998, 1163; P.E. 26; D.E. 81).

26. Jerome Gary was employed as a warehouseman between 9/18/74 and 6/23/78. Gary initially applied for a mechanic's position. He was promised a transfer to the garage as a mechanic when there was a vacancy. Gary was qualified to be a mechanic because of his prior experience and education. Gary made several requests for a mechanic's job between September, 1974 and the middle of 1975. Two white employees (H. Burris, S. Richards) transferred from the warehouse to mechanics' jobs during the

1975 period of Gary's requests. In 1975, four white and one black mechanics were hired. In 1976, fifteen white and one black mechanics were hired (P.E. 2). In 1975, four whites and one black were promoted or transferred to a mechanic position. (P.E. 3). In 1976, five whites and one black were promoted or transferred to a mechanic position. In the summer of 1975, Gary asked to be transferred from a standup (Raymond) lift to a sitdown lift. Mitchell denied that Gary made this request. This credibility issue is resolved in favor of Gary. Gary was qualified to operate a sitdown lift. Two junior whites were transferred from standup to sitdown lifts shortly after Gary's request. The sitdown lift pay was higher. Gary was denied a mechanic's job and a transfer to the sitdown forklift because of his race. He is entitled to

appropriate relief at the Stage 2 pro-proceedings. (Tr. 129-152, 968, 969; P.E. 26).

27. Christopher McKinney has been employed by Harris-Teeter since 6/18/75 at the warehouse in the dry grocery department. McKinney has been a forklift driver. When he expressed an interest in promotion, McKinney informed Harris-Teeter management of his 2-1/2 years experience supervising six employees. He was on strike from 11/16/76 to 2/27/77 when he informed Harris-Teeter that he was available for work. McKinney performed his job well. In April, 1977, a junior white employee, Jeff Fowlkes, wa promoted from produce leadman to foreman trainee in the grocery department. Foreman trainee is basically the same job as leadman (Tr. 1017). McKinney was not considered for the foreman trainee job. Mitchell testified that McKinney was not qualified because of

a poor work record. When asked to examine McKinney's personnel file, Mitchell could not find any record of a warning due to poor job performance. Warnings were given to some employees for poor job performance. McKinney had more warehouse and departmental experience than Fowlkes. McKinney was qualified for the trainee job because of his experience. Michael Weaver (white, hired 11/24/76) was promoted on 5/30/77 from day shift picker to night shift dry grocery leadman. McKinney was not fairly considered for this job even though he was on the same shift and in the same department. McKinney was qualified for this job because of his prior experience. McKinney was denied the foreman trainee job and the leadman job because of his race. He is entitled to appropriate relief in Stage 2 proceedings. (Tr. 189-206, 1017, 1020, 1088-90, 1075-1078; P.E. 26; D. E. 81).

28. Roy Torrence was hired by Harris-Teeter at its warehouse on 9/18/74 as a maintenance (sanitation) employee. His duties included forklift driving, sorting damaged food, and rebuilding pallets. His prior work experience included supervisory duties and self-employment. Torrence trained a white employee of Harris-Teeter (Neal Mitchell, hired 5/12/75) who was promoted to foreman of the maintenance (sanitation) department on 6/16/75. Before Mitchell was hired, Torrence asked Dick Jackson (sanitation department supervisor) for the foreman job to which Mitchell was promoted. Jackson told Torrence that he would never be foreman or leadman as long as Jackson was there. Jackson denied this. (Tr. 1124, 1126). The Court resolves this credibility issue in favor of Torrence. On 8/15/78 a junior white employee (Earl Hanson, hired 11/16/77) was promoted to a

sanitation leadman for the same shift and in the same department that Torrence worked. Torrence was never considered for the job that Mitchell got. Torrence was described by his supervisors (Mitchell, Jackson) as having "excellent attendance" and "excellent performance" five times between 9/24/74 and 6/16/75. (Tr. 1016, 1126, 1132-33). These ratings conflict with the testimony of defendant's witnesses (Tr. 1122-23, 955). The Court resolves the conflict in favor of Torrence and finds that he was a good employee. Torrence filed a grievance for not being promoted to the position Hanson received. The criteria used in comparing Torrence and Hanson were subjective. Torrence was denied these jobs because of his race. He is entitled to appropriate relief in Stage 2 proceedings. (Tr. 244-60, 1016, 1124, 1126, 1132, 1133; P.E. 26; D.E. 75, 91, 92).

29. Roosevelt Patterson worked for Harris-Teeter during parts of 1972 and 1973. He has been employed continuously at the warehouse since 10/12/73. His prior work experience included assistant gas station manager and assistant warehouse manager positions. Since he was rehired in 10/73, Patterson's classifications include night shift meat picker and day and night shift forklift driver, all of which were in the meat department. In 9/77 Patterson was in "receiving" temporarily. He was the only person performing the receiving duties. Two persons normally performed the receiving duties. Patterson asked for assistance and did not get any. Patterson asked to return to his lift job because of the failure to provide help. When whites worked as receivers, there were two of them except for one instance where a white employee performed the job alone. Patterson was on strike from

11/17/76 until 2/27/77 when he informed Harris-Teeter that he was avaiable for work. He returned to work on 3/3/77 as a lift driver in the freezer department. Patterson asked for leadman jobs. He was told that since he had left the receiver's job, he would not become a leadman. Patterson had worked in various departments as a receiver, picker, and a lift driver. His work performance was praised by warehouse management. The following junior whites were promoted:

(a) Jeff Fowlkes was hired May, 1976 as a produce picker. He was made a de facto produce leadman in September or October, 1976, and given the title of leadman on 11/22/76. He was made a foreman trainee in 4/77 (grocery) and a foreman in the grocery department on 9/22/77.

(b) Terry Givens was hired as a picker on 11/3/74. He was promoted to meat leadman on 6/7/76, and to foreman on 8/22/77.

(c) David Allison was hired on 5/19/76 as a meat picker and was promoted to meat leadman on 5/16/77 and to foreman on 6/25/78.

(d) Clyde Kiker was hired on 11/23/76 as a produce picker. He was promoted to a produce leadman on 8/7/77, nine days after a warning on 7/29/77 that he had been tardy six times between 6/5/77 and 7/29/77. He was made a foreman on 6/25/78.

(e) Neal Mitchell was hired on 5/12/75. He was promoted on 6/16/75 to foreman (sanitation). In 9/75, he was transferred to the night shift (sanitation) as a foreman. (Tr. 277-8).

Mr. Patterson wa qualified for those jobs because of his experience and his job performance. Harris-Teeter contends that Patterson was not eligible for any of the promotions since Patterson was either in a different department or on a different shift. (Tr. 999-1001). This reason is not

given credence. See Finding 16, supra. He was not considered for any of these positions. Patterson was denied promotion because of his race. He is entitled to appropriate relief in Stage 2 proceedings. (Tr. 262-302, 928, 999-1003; P.E. 26; D.E. 81).

30. Curtis Jones was hired by Harris-Teeter in 7/74. His prior work experience included loading and unloading freight. In 7/78, Jones became a dry grocery picker. He was then transferred to the "salvage" dock, where he unloads pallets weighing 30 to 40 pounds. In the spring and fall of 1976, Jones asked for a job as a rail unloader. This job involves the unloading of cases with an average weight of 30 to 40 pounds, and an upper limit of 60 to 70 pounds. The defendant contended that Jones was not promoted because he had back problems. Jones was never asked by the supervisor of the

rail dock about his back. His medical problems were minor. Two whites (James Lamb, Eddie Kistler) were hired as rail dock unloaders after Jones asked about the job. Jones was qualified for this job because of his prior work experience. The statistics show that Harris-Teeter hired seven whites and no blacks as unloaders. Jones was denied this job because of his race. He is entitled to appropriate relief in Stage 2 proceedings. (Tr. 303-311, 1108, 1112; P.E. 2, 26).

31. John Thomas Johnson: Johnson was employed in February of 1975 as a picker and lift operator in the meat department and later in the produce department. He was qualified and available for the lead job and for the foreman job to which Jeff Fowlkes was promoted. Fowlkes was slotted into the lead man's job in October of 1976, and received the actual job title in November, 1976. Johnson's complaint as to Fowlkes

(and as to David Allison and Clyde Kiker) relates to promotions which occurred in April, 1977 (Fowlkes); May, 1977 (Allison); and August, 1977 (Kiker). Although Johnson was available and qualified from the time he abandoned the strike in February of 1977, he did in fact turn down a night job at $4.80 so that he could stay in a day job at $3.90 and look after his children. (His actual testimony on this issue was evasive, and it was only after some prodding from the Court that he ever gave a clear answer about the "family reasons" which moved him to reject the higher paying job). Defendant says that his turning down the night shift work was the reason he was not considered for promotion. I am not sure that I ought to take that reason at face value, but I am unable to conclude that it was solely pretext. Relief will not be ordered for John Thomas Johnson.

32. Frank Sullivan was hired by Harris-Teeter at its warehouse in 7/69 as a milk picker. Between February and June, 1972, Sullivan was involved in foreman training. Sullivan also worked as a receiver and as a "slot master." In the summer of 1973, Sullivan was informed by management personnel that he was a leadman. Mitchell announced this to the entire department. Sullivan was a leadman between 7/73 and 2/74. In 2/74, Mitchell told Sullivan that he was a slot master and not a leadman because Sullivan had left the foreman trainee program earlier. Sullivan was on strike from 11/17/76 until 2/27/77, when he informed Harris-Teeter that he was available for immediate employment. Sullivan returned to work as a meat picker in 6/77. He subsequently became a dry grocery picker, frozen food lift driver and a grocery slot master. Sullivan, assigned to the meat department, worked

in all of the departments because of his duties. Sullivan was informed by management personnel that his job performance was good. Junior white employees were promoted to leadman positions as follows:

(a) Curtis George Hamilton, hired 9/22/70, was promoted to leadman on 10/25/76 and foreman on 11/15/76. Sullivan worked on the same shift and in the same department. Hamilton became Sullivan's leadman as a result of the promotion.

(b) Clyde Kiker, hired 11/23/76, was promoted to leadman on 8/7/77 and foreman on 6/25/78.

Harris-Teeter advanced two reasons for Hamilton's promotion. The first was that Hamilton "had much more experience in receiving." The evidence reveals that, prior to Hamilton's promotion, Sullivan and Hamilton had the same amount of experience. Furthermore, Sullivan had experience as a leadman

and had performed a broader range of job duties than either of the promotees. The second reason was that four years earlier, in 1972, Sullivan had requested to leave a night shift foreman trainee position in 1972. This was the same reason used to remove Sullivan as a leadman in 1974. Those reasons are not persuasive. As to Kiker, the defendant contended that Sullivan was not considered for Kiker's job because he was in a different department. This is not a valid reason. See Finding 16, supra. Sullivan was qualified to perform these jobs because of his job performance and his experience at Harris-Teeter. Sullivan had more company and departmental experience than Hamilton. Sullivan was denied the Kiker and Allison positions because of his race. He is entitled to appropriate relief in Stage 2 proceedings. (Tr. 377-400, 944-951, 1006, 1161; P.E. 26; D.E. 81).

33. Kenneth Bailey was hired by Harris-Teeter as a stocker at its warehouse on 4/17/74. His next position was that of loader. He was classified as a forklift driver on 8/4/75. He was on strike between 11/17/76 and 2/27/77 when he informed Harris-Teeter that he was available for employment. He returned on 7/18/77 as a picker. On 8/29/77, Bailey was classified as a lift driver. Bailey worked only in the dry grocery department. Two junior whites were promoted to leadman in the dry grocery department on the same shift that Bailey worked.

(a) Wade Carpenter, hired on 6/8/76 as a picker, was promoted to leadman on 7/10/78. Carpenter regularly performed the duties of a picker prior to his promotion to leadman. He supervised pickers, loaders, and forklift drivers as a leadman. Bailey had performed all of these duties at various

times. Carpenter went on strike when Bailey did.

(b) Richard McClain, hired as a picker in 12/75, was promoted to leadman on 6/4/79. As a picker, he was the "shortman." This meant that he did not assemble full orders. McClain replaced Carpenter as the leadman. Bailey performed a broader range of duties than McClain. Bailey was not considered for either position even though he was in the same department. Bailey was qualified for said positions since he performed all of the departmental duties, and had more departmental experience than either promotee. Bailey was denied promotion because of his race. He is entitled to appropriate relief in the Stage 2 proceedings. (Tr. 462-509, 1185; P.E. 26, D.E. 81).

34. John LeGrand was hired by Harris-Teeter on 7/8/74 as a frozen food picker. His next position was frozen food loader.

LeGrand was trained to act as a "fill-in" leadman, and in fact did "fill in" as a leadman until Randy Avery (white) was hired. LeGrand trained Avery in the duties of a "fill-in" leadman. Avery then assumed LeGrand's place as "fill-in" leadman. Avery was offered a full-time leadman's position, which he refused. LeGrand was never offered this job. LeGrand informed Harris-Teeter management of his prior experience as a leadman at a textile mill. LeGrand was on strike from 11/17/76 until 2/27/77 when he informed Harris-Teeter that he was available for employment. He returned in 8/77 as a picker. He was classified as a forklift driver in 7/77. Junior whites were promoted to leadman positions as follows:

(a) Doug Dover, hired on 10/31/74 as a picker, was promoted to night shift leadman in the produce department on 1/26/76. In this job Dover set up the trucks for the

produce department and put together the orders. LeGrand performed these same duties in the freezer department. On 8/30/76, Dover left this position.

(b) Terry Givens was rehired on 11/3/74, after previous employment of three weeks early in 1974. On 6/7/76, he was promoted to leadman in the meat department on the night shift.

(c) Jeff Fowlkes was hired 5/16/76, as a produce picker. On 11/22/76, he was formally given the job title of leadman in the produce department. He replaced Dover. Fowlkes was the "de facto" leadman in that he performed the duties of a leadman in September and October, 1976. Fowlkes supervised the loading duties in September and October, 1976. LeGrand had more experience in loading. LeGrand was considered ineligible for the loading duties that Fowlkes got because he was in a different department.

LeGrand was qualified to perform the leadman duties because of his prior job performance and his experience, including supervision. LeGrand ws considered ineligible for the leadman positions because he was on a different shift and/or department. LeGrand was denied promotion because of his race. He is entitled to appropriate relief during Stage 2 proceedings. (Tr. 510-539, 951-953, 1010, 1039, 1040; D.E. 81; P.E. 26).

VI. MAINTENANCE OF CLASS ACTION

35. Plaintiff Lilly moved for class certification on or about 5/20/77. Defendant opposed said motion. By Order dated 7/22/77, this Court certified a class consisting of the following:

> Plaintiff, and all blacks currently employed by defendant Harris-Teeter in its Mecklenburg County facilities; all blacks employed

by Harris-Teeter in its Mecklenburg County facilities at any time since 7/20/74, who are not currently employed, and any blacks who are hired in the future, all of whom have been or will be subject to racial discrimination by Harris-Teeter in its employment policies of hiring, hiring into certain jobs, racially segregated job classifications, promotions, interviewing, termination, and discipline.

36. Intervenors McKinney, Reed, LeGrand, Bailey, Sullivan, Mobley, Gatewood, Gary, Jones, McManus, Torrence, Fisher, Johnson, Hunt, McVay, Patterson, Covington, Carrothers, Goodwin, Burch, and Gregory were certified as class representatives on August 3, 1979.

37. The initial class certification included the stores, main office, and warehouse located in Mecklenburg County.

38. No plaintiff worked at the main office. McManus, a warehouseman, sought a job at the main office. The jobs at the main office include clerical, middle management, and upper management jobs. (P.E. 1, 2). The class finally certified should be defined to exclude the main office.

39. At the time the original class was certified, the definition of the class included unsuccessful applicants for initial employment. The only claimant who presented an initial hiring claim was Porter. Porter never sought to be certified as a class representative.

40. There is no evidence in the record as to the number of unsuccessful black job applicants.

41. There is no class representative applicant for initial employment to protect the interests of applicants for employment.

42. All claimants (except Porter) were employed by Harris-Teeter at either retail stores or the warehouse. Their claims include discharge and job placement (demotion, transfer, promotion). Defendant has no written job descriptions, and presented little evidence concerning job duties. The evidence of job duties indicates that they are not difficult. (Tr. 22, 48, 49, 100-102, 135, 155, 157, 245, 378-79, 515, 864, 1108; P.E. 26-A). The overwhelming majority of jobs at the warehouse and stores have skills which are held by or are readily available to the general public. For example:

(a) At the warehouse, when one excludes supervisory and skilled jobs, the following proportions of the work force remain

(P.E. 1): 1977: 86.1 (347/403); 1976: 89.9 (525/584); 1975: 90.8 (377/415). In 1975 and 1977 the excluded jobs included leadman positions (described as a working supervisor, Tr. 712), safety technician, battery repair, all mechanic jobs, garage superintendent, all foreman jobs, supervisors, serviceman, electricians, and refrigeration jobs. In 1976 the same jobs are excluded with the addition of foreman, trainee/leadman.

(b) Stores: If one excludes the management and skilled jobs, (e.g. managers, manager trainees, head cashiers, meat cutters) the following proportions of the entire work force remain (P.E. 1): 1977, 86.4% (580/671; 1976, 91.9% 1198/1303); 1975, 90,5% (1167/1290).

43. Plaintiffs Reed and Gregory worked at store numbers 2, 9, 83, and 22. Each store has the same basic range of jobs. Each

store performs the same function--retail sale of food and other items commonly found in the supermarket. Defendant presented no evidence showing there was a difference in employment conditions among the various stores. The stores were under the direction of a territorial supervisor who had unilateral authority to hire, fire, and demote from the department head level and down. During the years in question, one territorial supervisor (Higgins) supervised nine of the fourteen stores in Mecklenburg County.

44. The size of the annual work force of Harris-Teeter at the stores and warehouse is approximately 1500-2000 persons (P.E. 1; D.E. 16-25). The overwhelming majority of jobs are basically those which have skill requirements which are held or readily obtainable by the general population. Employment conditions are generally the same. Employees are transferred and

promoted between the stores and warehouse departments. Warehouse employees went into store management (e.g. Fowlkes, P.E. 26) and were offered store management trainee programs (e.g. Allison, P.E. 26).

45. Common features of the promotion and termination practices at the stores and warehouse are: a basically all-white supervisory work force; unfettered discretion as to whom to promote or terminate; unwritten subjective criteria for promotion and termination; no written job descriptions; no written regular job performance evaluations; and, the necessity of the recommendation of the immediate supervisor for promotion. Defendant did not present any evidence to show that the conditions of employment were significantly different between the stores and warehouse. The certified representatives have the same claims (promotion,

discharge) as the members of the defined class.

46. Based upon the record in this case, the class to be certified should exclude the main office and be limited to the practices of temrination and promotion. The final class should be defined as follows:

Plaintiffs Lilly, Gregory, Reed, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Johnson, Gatewood, Sullivan, Bailey, and LeGrand, and all blacks currently employed by Harris-Teeter at its warehouse and store numbers 1, 2, 5, 8, 9, 22, 39, 52, 53, 55, 59, 62, 66, and 83 located in Mecklenburg County; and all blacks employed by Harris-Teeter (at said warehouse and stores) at any time since 7/20/74, who are not currently employed, all of whom may have been or may be subjected to racial discrimination by Harris-Teeter in its employment

policies and practices in reference to terminations and promotions.

VII. ISSUES OF CLASS DISCRIMINATION

Terminations

47. The only written policy for terminations is set forth at P.E. 14, p. 210. This consists of a series of "DON'TS" which may result in discipline and/or discharge. The system of discipline varied from one supervisor to another. An employee could be terminated with or without prior warnings. The supervisory work force was overwhelmingly white. (Tr. 1030; P.E. 5).

48. The statistical evidence shows that:

(a) The following number of persons were terminated for the stated reasons:

Mecklenburg 1974-1978

TYPE	W	W%	B	B%	TOTAL
All	2786	81.9	616	18.1	3402
Cause Involuntary	586	71.9	229	28.1	815

$$\frac{\text{Black for cause}}{\text{Black total terminations}} = 37.2\% \quad \frac{229}{616}$$

$$\frac{\text{White for cause}}{\text{White total terminations}} = 21.0\% \quad \frac{586}{2786}$$

The proportion of terminations for cause for blacks (37.2%) was much larger than the corresponding white figure (21%) (Tr. 576-78, 603-606, 1238, 1253; P.E. 34 (mistakenly referred to as 31 during the trial); D.E. 36).

(b) The pattern for 1974-1978 in Finding 48(a) is the same when individual years are examined. (P.E. 4, pp 53-65)

Percentage of Involuntary (Cause) Terminations of Total Terminations by Race

YEAR	W	B
1974	24.2 (214/877)	39 (138/354)
1975	29.0 (225/774)	52 (74/142)
1976	22.3 (170/761)	38.5 (37/96)

(c) The percentage of the black workforce subjected to involuntary (cause) terminations was much higher than the corresponding percentage of whites.

Percentage of Work Force Involuntarily Terminated (For Cause)

YEAR	W%	B%
1975	14 (225/1869)	25 (74/300)
1976	9 (170/1794)	13 (37/294)

P.E. 4 at pp 63-65

(d) Between 1974 and 1978, blacks represented 28.1% of all involuntary (cause) terminations while they represented the following annual percentage of Harris-Teeter's Mecklenburg County workforce.

(Tr. 1253; P.E. 34; D.E. 16-25): 24.5% (1974); 16.8% (1975); 13.9% (1976); 11.7% (1977-78).

(e) The foregoing data can be statistically tested. The test is the application of a well-defined Court-approved mathematical formula to data already found to be substantially reliable. This test was described by the United States Supreme Court in Hazelwood School District v. U.S., 433 U.S. 299, 311-312, n. 17 (1977); and Castaneda v. Partida, 430 U.S. 482, 496-97, n. 17 (1977). A number of standard deviations of more than two or three beyond the expected supports a finding of discrimination undercutting a hypothesis that race was not a factor. EEOC v. United Virginia Bank, 615 F.2d 147, 151 (4th Cir. 1980), the Court, in discussing its application of the test, "recalculated" various factors. In Garrett v. R. J. Reynolds, 81 F.R.D. 25, 32-37

(M.D.N.C., 1978) the Court applied the same test to the statistical data presented by the parties. In the following tests the sample of total involuntary termination (815) and observed number of black involuntary terminations (229) remain the same. The only difference is the black percentage of the Harris-Teeter work force which is used.

(1) 1974-1978: The sample is 815 (Finding 48(a), supra); the black percentage of the Harris-Teeter work force is 15.4% (median annual percentage of work force between 1974-78 as set forth in Finding 48(d)); the observed number is 229; the expected number (total sample x black percentage of Harris-Teeter work force) equals 125.5; the difference (observed minus expected) is 103.5, the standard deviation (square root of sample x black percentage x white percentage) equals 10.304; and, the number of

standard deviations beyond the expected equals 10.045 (difference divided by standard deviation).

(2) If the same test is used with a slightly different black percentage of the Harris-Teeter work force between 1974 and 1978: (15.7% computed by the addition of the annual black percentages as set forth above in Finding 48(d), and dividing the total by five years to obtain an annual average), the result is 9.725 standard deviations beyond the expected. If the same test is used with another slightly different black percentage of the Harris-Teeter work force between 1974-1978: (15.3%: 9715 whites, 1767 blacks, 11,482 total persons, D.E. 16-20, 21-25), the result is 10.149 standard deviations beyond the expected.

(f) 1975: The black percentage of the Harris-Teeter work force is 16.1% (P.E. 4, p. 64); the sample has 299 total involuntary

terminations (P.E. 4, p. 64); the observed number is 74 (P.E. 4, p. 64); the expected number is 48; the difference is 26; the standard deviation equals 6.356; and the number of standard deviations from the expected is 4.09.

49. In addition to the statistics, there are specific examples of the unequal operation of the termination policy. Lilly gave examples in his testimony of whites "laying out" who were not terminated, while blacks (who were tardy) were terminated. (Tr. 56, 69-71, 87-88). Another example involves Richard Gregory who was demoted without any record of prior written warnings, while Boyce Mullis was allowed to hold onto his job in spite of numerous written warnings and finally given an opportunity to resign after those warnings. See Finding 24, supra.

(Continued in Appendix, Volume II)

50. The foregoing statistics support an inference that the application of the termination practice had a greater impact upon blacks. Defendant offered no explanation for the statistical difference. The evidence reveals that the criteria utilized in the termination system were within the unfettered discretion of the supervisors. The criteria were not in written form. The application of such a practice, as shown by the foregoing statistics, can and does have an adverse impact on blacks. There are specific examples of whites receiving warnings only after extensive absences or tardiness, or receiving no warning at all:

(a) Steven Dutch: Dutch was tardy 16 times in 2 months before receiving a written warning. P.E. 26 at 104-105;

(b) Michael Frick: Frick missed 38.4% of the hours between 2/13/78 and 4/7/78. He had ten unexcused absences between 4/4/78

and 6/19/78. He had no warnings. (P.E. 26 at 113-116);

(c) Clyde Kiker: Kiker was counseled on 7/29/77 about being tardy six times between 6/5/77 and 7/29/77. He was promoted to leadman on 8/7/77. (P.E. 26 at pp 132-133).

Promotions

52(a) The promotion practice has the features set forth in Findings 10-20, supra.

(b) The recommendations of the supervisor (foreman) was necessary for promotion both at the stores and warehouse. The supervisory work force at the stores and warehouse was overwhelmingly white. At the stores in 1975 and 1976, the supervisory force was at least 95% white, and it was at least 91% white at the warehouse (P.E. 5). There have been no black supervisors at the warehouse. (See Findings 18-21, supra; Tr. 468, 470). In 1975, 11 of 13 stores had an all-white

supervisory work force; in 1976, 10 of 13 stores had an all-white supervisory work force.

53. The statistical evidence shows that:

(a) In 1976, blacks represented 5.8% of 137 store promotions and 9.0% the store workforce. Sixty whites (93.8%) and four blacks were promoted to store management jobs (assistant produce manager, produce manager, assistant market manager, market manager, grocery manager, acting grocery manager, grocery manager trainee, relief grocery manager, deli manager, relief assistant manager, assistant manager, head cashier, assistant head cashier). (P.E. 1, 23). In non-management store jobs, there were 69 whites (94.5%) and four blacks (5.5%) promoted.

(b) In the warehouse, there were nine whites and two blacks promoted to

leadman/foreman jobs in 1976. (P.E. 3). These 1976 promotions kept the official/managers jobs basically all white. In 1975, 94.6% of officials/managers were white and in 1976 it was 94.7%. (P.E. 5, p. 69).

(c) In 1975, at the stores, blacks represented 3.6% of 110 store promotions, and 8% of the store work force. Forty-four whites (100%) and no blacks were promoted into management jobs (assistant market manager, market manager, produce manager, assistant produce manager, relief produce manager, grocery manager, relief grocery manager, relief head cashier, assistant store manager, deli manager, assistant head cashier, head cashier, assistant manager, store manager, relief assistant manager, management trainee). (P.E. 23). Sixty-two whites (93.9%) and four blacks (6.1%) were

promoted into non-management store jobs. (P.E. 1, 3, 30, 21, 23).

(d) A comparison of the white and black selection rates shows:

(e) At the stores/warehouse in 1975, 70.5% of the whites (124/176) who changed job titles received pay increases, while the corresponding percentage for the blacks is 56.8% (25/44). (P.E. 3).

VIII. OTHER FINDINGS

Hiring

54. In reference to hiring, the evidence shows that:

(a)(1) In 1976, the store jobs of bagger, stock clerk, produce clerk, and deli bakery clerks accounted for 531 hires or 82.5% of all hires (531/644). (P.E. 2). In 1975, these same jobs accounted for 82.4% of all hires (540/655). (P.E. 2). In 1976, two persons, both white, were hired into managerial jobs (grocery manager, assistant market manager). This is 0.3% of the total hires. (P.E. 2). In 1975, one person (W)

was hired into a management position (assistant market manager). This is 0.2% of the total hires. (P.E. 2).

(2) In 1976, in the warehouse jobs of picker, driver, stocker and forklift driver, there were 255 hires or 76.1% of all hires (255/335). (P.E.2). In 1975, these same jobs accounted for 74.5% of all hires (143/192). (P.E. 2).

(b)(1) Defendant has no written job descriptions. The overwhelming majority of jobs at the warehouse (e.g. picker, driver, stocker, and forklift driver) and at the stores (e.g. bagger, cashier, stock clerk, produce clerk, deli bakery clerk) have skill requirements which are held by or readily available to the general public. See Finding 42, supra; P.E. 26-A.

(2) Defendant has no educational requirements for its jobs.

(3) Defendant did not present any evidence showing the degree of skill required in any job.

55. The appropriate labor markets show the following black availability (P.E. 8).

(a) Mecklenburg County labor force:

1. 1973 21.2%B

2. 1976 21.8%B

(b) Charlotte Standard Metropolitan Statistical Area (SMSA) Experienced Civilian Labor Force: 1970 20.4%B

56. Harris-Teeter hired as follows:

		Total	W	B
1975	Stores	655	613	42
	Warehouse	192	122	70
	Total	847	735	112
1976	Stores	644	596	48
	Warehouse	335	267	68
	Total	979	863	116

57. The plaintiffs' statistical expert conducted a statistical analysis of the data

set forth in P.E. 8. He used the "Z test for significance of difference between proportions" and a "T test." These standard tests are accepted by statisticians. The test results were:

(a) Hires in all Mecklenburg County facilities.

Year	Labor Market	Test Results
1975	Mecklenburg Labor Pool	0.001
1976	Charlotte SMSA Labor Pool	0.001

The test results mean that there was one chance in one thousand that the lower percentage of black hires at Harris-Teeter could have occurred randomly (disassociated with race) when compared with the labor market availability of blacks.

(b) Hires at stores:

Year	Labor Market	Test Results
1975	Mecklenburg County Labor Pool	0.001
1976	Charlotte SMSA Labor Pool	0.001

The test results mean that there was one chance in one thousand that the lower percentages of black hires at Harris-Teeter stores could have occurred randomly (disassociated with race) when compared to the labor market availability of blacks.

(c) Combined Hires 1974-1976:

Unit of Hires	Labor Market	Test Results
All	Mecklenburg Labor Pool	0.001
	Charlotte SMSA Labor Pool	0.001
Stores	Mecklenburg Labor Pool	0.001
	Charlotte SMSA	0.001

The test results mean that there was one chance in one thousand that the lower percentage of black hires at Harris-Teeter could have occurred randomly (disassociated with race) when compared to the labor market availability of blacks. All test results were statistically significant. (Tr. 652-658).

58. Utilizing the test set forth in Finding 48(e), supra, and the hiring data set forth in Finding 56, and the labor markets set forth in Finding 55, supra, the following results are obtained:

Unit	Year	Total W	Total B	Pro W	Pro B	W Rate	B Rate	B Rate W Rate
Warehouse/ Store	1976	1603	284	171	21	10.66%	7.39%	69.3%
Stores	1975	1191	99	104	6	8.73%	6.1%	69.8%
Stores	1976	1192	111	129	8	10.8%	7.2%	66.7%

(P.E. 2, 5, 23).

YEAR	TOTAL HIRED	BLACK AVAILABILITY	EXPECTED NUMBER	OBSERVED NUMBER	STD DEV.	NO. OF STD. DEV. FROM THE EXPECTED
1975	847	21.2% (Co. Labor Force, 1973)	179.56	112	11,895	5.680
		20.4% (Charlotte SMSA Experienced Labor Force)	172.8	112	11.728	5.184
1976	979	21.8 (Co. Labor Force, 1976)	213.4	116	12.919	7.539
		20.4 (Charlotte SMSA Labor Force)	199.7	116	12.608	6.638

If one utilizes the same test and excludes persons hired into management or skilled jobs, the results are as follows:

1975	838	20.4 (Charlotte SMSA)	171	110	11.665	5.221
		21.2 (Co. 1973)	177.7	110	11.831	5.722
1976	947	20.4 (Charlotte SMSA)	193.2	115	12.401	6.305
		21.8 (CO., 1976)	206.5	115	12.706	7.201

For the store hires in 1976, the excluded jobs are grocery manager, assistant market manager, produce manager trainee, meat cutter, grocery manager trainee, and deli manager trainee. This would make the hiring breakdown 583 whites and 48 blacks. In 1976, for warehouse hires, the excluded jobs would be mechanic III, refrigeration mechanic, forklift mechanic, electricians, and maintenance mechanic. This would make a hiring breakdown of 249 whites and 67 blacks. In 1975 at the stores the excluded jobs would be meatcutter and assistant market manager. This would make the breakdown 611 whites and 41 blacks. In 1975 at the warehouse the excluded jobs would be forklift mechanic, mechanics and leadman. This would make the breakdown 117 whites and 69 blacks. (P.E. 2).

Decrease in Black Work Force; Increase in White Work Force

59. There was a considerable decline in the number of black employees between 1974 and 1978. There was a considerable increase in the number of white employees.

(a)

Year	W	B	Source
1974	1546	527	D.E. 5, 14, 15, 20, 25
1975	1507	321	D.E. 4, 12, 13, 19, 24
1976	1887	309	D.E. 3, 10, 11, 18, 23
1977	1872	267	D.E. 2, 8, 9, 17, 22
1978	2372	322	D.E. 1, 6, 7, 16, 21

(b) The differences between 1974 and 1978 are 826 additional whites and 205 fewer blacks. The black work force decreased by 38.9% (205/527), while the white work force increased 53.4% (826/1546). The defendant did not offer any explanation as to why there was a large decrease in the black work force and a large increase in the white work force.

60. Employment practices by the defendant as a company, statistical evidence, and

individual cases of discrimination support the findings of discrimination set forth in paragraphs 22-58.

61. Plaintiffs' attorneys have provided valuable services.

62. Dr. Michalowski is an expert in statistics, and performed valuable services.

63. The discrimination against Messrs. Porter, Lilly, Reed, Gregory, Gary, Mobley, McKinney, Torrence, Patterson, Jones, Sullivan, Bailey, and LeGrand was because of the employees' race or because they filed EEOC charges, or both.

64. Plaintiff Trial Exhibits 1-9, 11-25, 26 (except page 58), and 26A-34 are admitted into evidence and are specifically found to be accurate. (Tr. 692-94, 1254) (At trial, plaintiff's exhibits 31-34 were mistakenly referred to as plaintiff's exhibits 28-31).

65. The claims of Fisher, Gatewood, Ervin, Carrothers, Anderson, Pharr, Goodwin, McManus, McMoore, Burch, and Reed (termination) were dismissed by Order (filed 6/7/81).

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5(f)(1) and 2000e-5(f)(3) (§§706(f)(1), 706 (f)(3) of the Act.)

2. The defendant is an employer within the meaning of 42 U.S.C. §000e(b) and a person within the meaning of 42 U.S.C. §1981.

3. All procedural requirements of Title VII have been met, 42 U.S.C. §2000e-5(f)(1).

4. Intervenors Reed and Gatewood worked in a store, as did plaintiff Gregory. The remaining intervenors worked in the same warehouse as did plaintiff Lilly. Both Lilly and Gregory filed timely charges with the

Equal Employment Opportunity Commission (EEOC). The claims of the intervenors involved racial discrimination at Harris-Teeter's warehouse and stores. The claims of Lilly and Gregory involved racial discrimination by Harris-Teeter at the warehouse and stores. The motion was timely. The claims of the intervenors were identified in plaintiffs' answers to defendant's interrogatories prior to the motions to intervene. The fact that none of the intervenors (other than Gregory) has exhausted his administrative remedies does not prohibit intervention. Lilly exhausted his prejudicial administrative remedies. His amended charge alleged class discrimination in discharge and promotion (P.E. 17). The claims of each intervenor were within the scope of Lilly's charge. The intervention did not unduly delay or prejudice the adjudication of the rights of the parties. Federal Rules

of Civil Procedure, Rule 23(d) contemplates intervention. See Advisory Committee's Notes on Rule 23(b)(2), 39 F.R.D. 69, 102. The intervenors alleged a general policy of discrimination in termination and promotion as did Lilly in his EEOC charge and judicial complaint. Within the discretion of the Court, the intervention of Reed, Mobley, Gary, Gregory, McKinney, Torrence, Patterson, Jones, Johnson, Sullivan, LeGrand, Bailey, McManus, Fisher, Hunt, McVay, Covington, Carrothers, Goodwin, Burch, and Gatewood is proper. See e.g. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); Muskelley v. Warner & Swasey Co., 653 F.2d 112 (4th Cir. 1981); Wheeler v. American Home Products, 563 F.2d 1233 (5th Cir. 1977); and Oatis v. Crown Zellerbach, 398 F.2d 496 (5th Cir. 1968).

5. In reference to the claims of intervenors Reed, Mobley, Gary, McKinney,

Torrence, Patterson, Jones, Johnson, Sullivan, LeGrand, and Bailey, the defendant has raised the defense of the Statute of Limitations.

(a) Those intervenors have stated claims under 42 U.S.C. §1981. The Statute of Limitations for §1981 is the most analogous Statute of Limitations of the state where the deprivation occurred. In this state the most analogous Statute of Limitations is either N.C.G.S. §§1-52(1) or 1-52(2). See Chisholm vs. U.S. Postal Service, 516 F.Supp. 810, 871 (W.D.N.C. 1980) and Pittman v. Anaconda Wire and Cable Co., 408 F.Supp. 286, 293 (E.D.N.C. 1976). Each statute is for 3 years. The complaint in intervention was filed on 8/15/79. The claims of intervenors Reed, Mobley, McKinney, Torrence, Patterson, Jones, Johnson, Bailey, and LeGrand arose within 3 years of the filing of the complaint in intervention. They are therefore timely

except for the positions noted below: James Mobley (Terry Givens' promotion of 6/7/76); Jerome Gary, Roy Torrence (promotion of Mitchell on June 16, 1975); Roosevelt Patterson (promotion of Terry Givens on 6/7/76; promotion of Neil Mitchell on 6/16/75); Curtis Jones (hire of James Lamb in 5/76); and, John LeGrand (Doug Dover's promotion of 1/26/76; Terry Given's promotion of 6/7/76).

(b) A class is limited to those persons who could have filed timely EEOC charges at the time the class representative filed his or her charge. Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3rd Cir. 1975). The act of filing a class action Court complaint tolls the Statute of Limitations on the individual claims of members of the alleged class. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n. 13 (1974); American Pipe & Construction Co. v. Utah,

414 U.S. 538, 554 (1974); Parker v. Crown, Cork and Seal Company, ___ F.2d ___, Number 81-1965 (4th Cir. April 23, 1982); and Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978) cert. denied. 445 U.S. 942 (1980). In the context of 42 U.S.C. §2000e et seq., this means that the filing of a class action complaint tolls the Statute of Limitations for the claims of individual members of the class. The tolling date is 180 days prior to the filing of the class representative's EEOC charge. The earliest EEOC charge (Lilly) was filed on 1/20/75, and his judicial complaint was filed on 6/18/76. The beginning date of the class is 7/24/74. All of the complaints of the intervenors are based upon actions which occurred after 7/24/74. They could have filed EEOC charges at the time Lilly did or thereafter. The claims of the intervenors are timely. See e.g. Parker, supra, and

Gill v. Monroe County Dept. of Social Services, 79 F.R.D. 316, 331 (WDNY, 1978).

6. By earlier orders of the Court, these proceedings were conditionally certified as class actions under Rule 23. Reviewing this issue at the close of the evidence, the Court is of the opinion that class certification should be modified and made permanent. The requirements of Rule 23(a) have been carefully applied in this action. The analysis has been rigorous. Because of the evidentiary record in this case, the careful application of the requirements of Rule 23(a) and the rigorous analysis the previously certified class has been modified. There has been no presumption that any of the requirements of Rule 23 have been met. Each requirement has been met because of the record present in this case. See General Telephone Company of the Southwest v. Falcon, 50 U.S.L.W. 4638 (6/14/82), and

Stastny v. Southern Bell Telephone and Telegraph Co., 628 F.2d 267 (4th Cir. 1980). Lilly and Gregory have filed timely charges and have exhausted the administrative procedures under Title VII. The plaintiffs have presented evidence which supports their claims that they were discriminatorily denied promotions and discharged. They have, therefore, been subjected to the same practices from which they seek relief on behalf of the class. Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981).

(a) During the time relevant to this proceeding, defendant employed approximately 200 black employees annually. More than 200 black employees each year, including in excess of 50 store employees, and 150 warehouse employees, have been affected or potentially affected by defendant's employment practices. The number of black

employees affected is too numerous to make joinder of all class members practical.

(b) The claims of plaintiffs and the class present common questions of law and fact. The relief plaintiffs seek is also typical of the relief sought on behalf of the class. Plaintiffs have shown that over an extended period of time defendant has denied them equal promotional opportunities, and has discharged them discriminatorily. Defendant's promotion policy as well as the discharge procedure are applicable to all the stores and warehouse. Plaintiffs' evidence demonstrates that race has been the dominant factor which has influenced or determined defendant's personnel practices complained of. Plaintiffs seek relief from defendant's practices, as authorized by Title VII, for all black employees who have been adversely affected during the time relevant to this proceeding.

The evidence at trial demonstrated by means of statistics, proof of specific, individual cases, and review of unfairly applied personnel practices that black employees have been victims of these discriminatory practices and that such practices have classwide scope and effect.

(c) This Court's inquiry with regard to typicality is governed by Hill v. Western Electric, 596 F.2d 99 (4th Cir. 1979). In reliance upon East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), the Fourth Circuit held that persons employed by the defendant cannot represent a class which includes applicants for initial employment. This case has one claimant who had a hiring claim. All persons certified as class representatives have been or are employed by Harris-Teeter. Applicants for initial employment are hereby excluded from the class definition.

(d) Hill makes it clear that the typicality requirement is met by plaintiffs who are seeking to challenge practices at the same facility. 596 F.2d at 102. This case meets the Hill test. Two class representatives who exhausted the EEOC process worked at the stores and the warehouse. The other class representatives worked at either the stores or the warehouse. All of the certified representatives have the same claims as the class members (either promotion or discharge). Each store presents the same range of jobs and performs the same function retail sale of supermarket items. Nine of the stores were supervised by the same territorial manager. The warehouse functions were related to store activities. Employees were transferred and promoted among the various warehouse departments and between and among the warehouse and stores. Warehouse employees were offered positions

in the stores. The stores and warehouse are al located within the County. Common features of the promotion and termination practices which adversely affected black employees were present at both the stores and warehouse. The overwhelming majority of jobs required skills which are held by or are readily available to the general public. The warehouse and stores draw basically from the same external labor market for their hires. See e.g. Chisholm v. United States Postal Service, supra, 665 F.2d 482; and Patterson v. American Tobacco, 535 F.2d 257 (4th Cir. 1976).

(e) The main office is different. None of the plaintiffs and intervenors worked at that office. The jobs at the main office were specialized management jobs. The main office is hereby excluded from the class definition.

(f) Finally, by their conduct in this case and by presenting solid evidence of discrimination, plaintiffs and their counsel have adequately represented the interests of the class. The plaintiffs do not have interests antagonistic to those of the class.

(g) Through the implementation of personnel practices which have limited the employment opportunities of plaintiffs and other black employees, defendant has pursued practices which have generally affected black employees in the same way, thereby making appropriate final injunctive relief. Additionally, the questions of law and fact common to the employees affected predominate over any questions affecting only individuals. A class action proceeding will avoid conflicting results, will expedite final resolution of the various claims and is superior and preferable to other remedies

which may be available to plaintiffs and other black employees of defendants.

(h) These proceedings should, therefore, be certified as a class action under Rule 23(a) and (b)(2) with the class defined as Plaintiffs Lilly, Gregory, Reed, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Johnson, Gatewood, Sullivan, Bailey, and LeGrand; and all blacks currently employed by Harris-Teeter at its warehouse and store numbers 1, 2, 5, 8, 9, 22, 39, 52, 55, 59, 62, 66, and 83 located in Mecklenburg County; and all blacks employed by Harris-Teeter (at said warehouse and stores) at any time since July 20, 1974, who are not currently employed, all of whom may have been or may be subjected to racial discrimination by Harris-Teeter in its employment policies and practices in reference to terminations and promotions. See Chisholm v. United States Postal Service, supra; Wetzel v. Liberty

Mutual Ins. Co., 508 F.2d 239 (3rd Cir. 1975); EEOC v. Printing Industry of Metropolitan Washington, 27 EPD paragraph 32221 (D. D.C. 1981).

7. Plaintiffs may establish liability against an employer under Title VII by establishing that an employer has pursued or is presently pursuing policies and practices which limited the employment opportunities of black employees to a statistically significant degree. See e.g. Hazelwood School District v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. Radiator Specialty, 610 F.2d 178 (4th Cir. 1979); EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981). To make such a showing, plaintiffs must demonstrate that through the use of identifiable employment criteria or procedures black employees have suffered disproportionately.

The sample of employees affected must be otherwise eligible for he job positions or employment opportunities in question. Where statistics are used, the number of employees involved must be large enough for the Court to draw reliable conclusions and the disparate impact of the practices must be statistically significant (two or more standard deviations if binomial analyses are used) so that the observed cannot reliably have occurred by chance. Hazelwood, supra; American National Bank, supra. If plaintiffs rely on difference in treatment, they must demonstrate by the preponderance of the evidence that black employees have been treated differently in employment opportunities because of race and that the employer has acted intentionally or purposefully. Teamsters, supra. Purpose or intent may be shown by circumstantial evidence which eliminates all legitimate, non-racial explanations for

the employer's practices. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-268 (1977).

(a) Terminations (Findings 23, 47-50, supra). The policy is unwritten except for rules of conduct. A violation of the rules may or may not result in discipline or discharge. The system varies from one supervisor to another. Whites who violated the rules were not terminated while blacks were. White employees violated a rule many times before receiving a warning. Such features, where a statistically significant imbalance in employment actions has been shown, are badges of discrimination that tend to corroborate the racial bias shown by the statistics. E.E.O.C. v. American National Bank, supra, 652 F.2d at 1198. The raw statistical evidence shows that: a much higher proportion of the black work force was subjected to involuntary terminatioins;

between 1974-78, the black work force at Harris-Teeter decreased by 38.9% while the white work force increased by 53.4%; and, between 1974-78 blacks represented 28.1% of all involuntary terminations while representing a much smaller proportion of the work force. The statistical test results were that the actual number of blacks involuntarily terminated ranged from 4.09 to 10.149 deviations above the expected number of blacks. Those results rule out chance as a cause. American National Bank, supra, 652 F.2d at 1192. Defendant's only evidence was a summary of the numbers and reasons why persons were terminated. Plaintiffs' statistics alone support the conclusion that black employees as a class were discriminatorily discharged. When considered with the other evidence of record, that conclusion is inescapable. American National Bank, supra; Chisholm v. United Postal Service,

supra; Williams v. Trans-World Airlines, 660 F.2d 1267 (8th Cir. 1981); Flowers v. Crouch-Walker, 552 F.2d 1277 (7th Cir. 1977); Bolton v. Murray Envelope, 493 F.2d 191 (5th Cir. 1974); Edwards v. J. C. Penny, 27 EPD paragraph 32356 (N.D. Ga. 1981); Bledsoe v. Wilker Brothers, 24 EPD paragraph 31468 (W.D. Tenn. 1980).

(b) Promotions (Findings 10-20, 24, 25-34, 51-57)

There are no writtewn job descriptions, no written system of promotion or promotion criteria, and no system of regular job performance evaluation. The promotion criteria (e.g. "attitude," "initiative," etc.) were vague and subjective. Supervisors were not furnished written instructions specifying qualifications necessary for promotion. The supervisor's recommendation was an important factor in the promotion process. There was no job posting until 1979. The current

job posting is limited to the warehouse. The practice of the "same shift, same department" was applied unevenly. The only exception to it in the record are white persons. The overwhelmingly white management/supervisory work force of defendant is unfettered in its discretion to decide whom to promote and what factors to utilize in any promotion decision. Employees learned of vacancies by word of mouth, the appearance of a new employee, or current employee working a different job. There was no requirement that a person ask for a particular job in order to be considered. Refusals by blacks to take jobs on particular occasions were carefully remembered. They were never asked if they had changed their minds. Relevant job experiences of blacks was ignored by management. Relevant job experience of blacks not noted on the application form was deemed not to exist; however, word of mouth

experience of whites was remembered. These factors corroborate the racial bias shown by the statistics. American National Bank, 652 F.2d at 1198. The statistical evidence shows that: In 1975 and 1976 blacks represented a much lower percentage of the store promotions than their percentage in the store work force; in 1975-76 there were 104 whites and 4 blacks promoted to management jobs at the stores; and the black promotion rate was less than 70% of the white promotion rate. The instances of individual discrimination show the adverse effect of the defendant's promotion practices upon qualified blacks. The defendant's defenses to the individual claims showed disparate treatment (e.g. same shift/same department policy has only white exceptions; relevant prior experience of blacks either ignored or forgotten while that of whites carefully remembered). The defendant's statistical

defense unnecessarily limited the available black pool. This defense ignored qualified blacks and the exclusion of blacks from many jobs (Tr. Asher 51-52; D.E. 26-35, 123-25; P.E. 1). The evidence is reflective of both disparate impact and disparate treatment. The plaintiffs have proved a pattern and practice of discrimination on the basis of race in promotions through the use of statistical evidence and individual instances of racial discrimination. The examination of the promotion practice reveals that it was applied to blacks in an adverse and inequitable manner. International Brotherhood of Teamsters v. United States, 431 U.S. 324; Griggs v. Duke Power, 401 U.S. 424; Chisholm, supra; Brown, supra; American National Bank, supra, 652 F.2d at 1197-1202; Barnett v. W. T. Grant, 518 F.2d 543 (4th Cir. 1975); and Rock v. Norfolk and Western Railway, 473 F.2d 1344 (4th Cir. 1973). See also 29

C.F.R. §1607.4(d) and Chisholm, supra, 24 EPD paragraph 31326 at p. 18036 (W.D.N.C. 1978).

(c) Hiring (Findings 42, 53-57)

The hiring evidence, in conjunction with the promotion evidence, can be examined to determine whether discrimination is present. Fisher v. Proctor and Gamble, 613 F. 2d 527, 541 (5th Cir. 1980). The defendant has no written job descriptions. The evidence presented showed that the overwhelmingly majority of jobs had skills that are generally held by or readily available to the general public. The defendant never presented any evidence which justified its limitation of the available labor force to a special market. (D.E. 16-25). When, as a matter of law, there is a question as to whether a particular job or jobs have skills which justify the use of a special market, the defendant has the burden of presenting

evidence of the skills which require limitation to a special market. EEOC v. Radiator Specialty, 610 F.2d 178, 185 (4th Cir. 1979). A statistical analysis of all hires shows that there was one chance in 1,000 that the lower percentages of black hires at Harris-Teeter could have occurred by chance. When the same statistics were tested by the binomial test, the results were that the actual number of black hires varied from 5 to 7 standard deviations below the expected number. After eliminating management and skilled jobs, the same results were obtained. These results remove chance as a cause. American National Bank, supra, 652 F.2d at 1192. The hiring evidence supports the findings and conclusion of a pattern and practice of discrimination on the basis of race in promotions. Fisher, supra.

9. Where, as here, plaintiffs have succeeded in establishing that an employer

has discriminately denied black employees equal promotional opportunities or has discriminated against black employees in discharges, individual claims should be reviewed with this background. Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625, 637-643 (4th Cir. 1978). See also Teamsters, supra. Each class member is entitled to a presumption of discrimination. The employer can overcome this presumption by demonstrating by a preponderance of the evidence that factors other than the condemned discrimination caused the challenged decision. See also, American National Bank, supra at 1201.

10. This Court has reviewed the individual claims under the more restrictive standards of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) as further amplified by Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). See also, Teamsters, supra, 431 U.S. 324,

358, n. 44; Brady v. Thurston Motor Lines, ___ F.2d ___ (4th Cir. Jan. 11, 1982). Under this approach, individual claimants have the burden throughout the liability stage of establishing that they have suffered intentional discrimination. They may establish a prima facie case by showing that they: were qualified for promotion or transfer; a vacancy existed; they were not selected; and, a white employee was selected. They may also establish that they were treated differently by their employer in other employment opportunities than similarly situated white employees. If plaintiffs establish a prima facie case, the burden of producing some evidence, but not the burden of persuasion, shifts to defendnt to offer some legitimate, non-racial explanation for its practices. The employer should produce sufficient evidence to permit the trier of facts to determine whether the proffered

evidence, if taken at face value, explains its allegedly discriminatory action. If the employer offers a reason for the challenged action, plaintiffs must then show (with additional evidence) or demonstrate (based on evidence already admitted) that the employer's explanation is pretextual. The Court may then review all of the record evidence, with plaintiffs retaining the burden of persuasion, to determine whether unlawful discrimination has been established. Teamsters, supra; Burdine, supra.

11. The Court will now review the individual claims of plaintiffs, intervenors and class members who testified at trial under the above standards. All of the evidence bearing on each claim has been considered by the Court. The detailed examination included consideration of a prima facie case, articulation by defendant of a legitimate, non-discriminatory explanation

and whether the explanation was pretextual. Decisions of credibility have entered into the examination. Where the Court concluded that defendant offered proof of a legitimate, non-discriminatory explanation, that conclusion has been based upon admissible evidence with no burden of persuasion being placed on defendant. Where the Court concluded that the defendant's explanation was pretextual, it did so by examining all of the evidence with the plaintiffs bearing the burden of proof and persuasion throughout. Where liability was established, the Court also found proof of discriminatory purpose or intent in defendant's actions. Each prevailing claimant is entitled to appropriate relief in Stage 2 proceedings.

(a) Edward Porter established a prima facie case by showing that he applied for the position of truck driver, that he was qualified, that vacancies existed, that he

was not hired, and that whites were hired. Defendent stated there was no vacancy. Standing alone, this evidence constituted a legitimate, non-discriminatory reason. Considering all of the evidence, defendant's reason is pretextual. Nine whites were hired within 120 days of Porter's application. One white was hired nine months after he applied. Porter was not hired because of his race.

(b) Philip Reed established a prima facie case when he showed that he applied for the position of produce manager twice, that he was qualified, that vacancies existed, and that less qualified whites were selected. Defendant's stated reasons were that the selectees were more qualified and that there was no vacancy. These reasons, standing alone, are legitimate, non-discriminatory reasons. Considering all of the evidence, defendant's reasons are

pretextual. There were vacancies. Reed had more retail grocery management experience and was more qualified than the promotees. Harris-Teeter was aware of this experience but ignored it, just as it did with other black employees. See Finding 19. Reed was never considered for either position. The statistics show that 104 whites and 4 blacks were promoted to store management positions in 1975-76. Reed was affected by the discriminatory nature of the promotion system. Reed was denied the promotions received by Allen and Wilson because of his race.

(c) Paul Lilly complained about racial discrimination at Harris-Teeter on 1/8/75, and was discharged on 1/10/75. He had performed his job adequately. Lilly has established a prima facie case. Harris-Teeter stated that it terminated Lilly because of errors. This reason, standing alone, constitutes a legitimate, non-

discriminatory reason. Considering all of the evidence, defendant's reason is pretextual. The Court has made credibility decisions in favor of Lilly. Lilly was assigned beef-counting duties as part of inventory control; subsequent thereto there was a noticeable improvement. Counting erros had been made at the stores. Watson never checked to see if the errors allegedly made by Lilly had been made at the stores. Watson, who fired Lilly, used racial terms which are indicative of bias. See Murray v. American Standard, 373 F.Supp. 716 (E.D. La. 1973) aff'd 488 F.2d (5th Cir. 1973). Statistical evidence shows that blacks were involuntarily terminated at a significantly higher rate than their presence in the Harris-Teeter work force. The record shows differential treatment. See Findings 48-50. In fact one white with a very recent warning covering several acts of tardiness was

promoted. Lilly was terminated because of his race and his opposition to practices made illegal by Title VII. See Williams v. TransWorld Airlines, supra; Armstrong v. Index Journal Company, 647 F.2d 441 (4th Cir. 1981); Bolton v. Murray Envelope, supra; Brown v. Rollins, 397 F.Supp. 571 (W.D.N.C. 1974).

(d) Richard Gregory has proved a prima facie case of discriminatory demotion in that he was in a supervisory position, but he was involuntarily removed from said job, and he was replaced by a white employee. Jones v. Trailways, 477 F.Supp. 642, 645 (D. D.C. 1979). Defendant stated it demoted Gregory because of his poor job performance. Standing alone, this articulates a legitimate, non-discriminatory reason. Considering all the evidence, said reason is pretextual. The Court resolves issues of credibility in favor of Gregory. Gregory is a

credible witness. Gregory's work performance was praised by his subordinates and superiors. His attempt to terminate a white employee who called him a nigger was overruled. As a grocery manager, Gregory had to stock aisles himself while his white replacement did not. Gregory's demotion was decided by, and carried out in front of, the white territorial supervisor. There are very few blacks in store management positions. After Gregory was demoted, he was transferred to another store where he was harassed in various ways. Gregory, after filing his EEOC charge on 1/25/75, resigned in 5/75 because of the harassment and demotion. The conditions and treatment were intolerable and illegal. This justified Gregory's resignation. See Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978). Gregory ws demoted because of his race and was constructively discharged

because of his opposition to practices made illegal by Title VII.

(e) James Mobley has proved a prima facie case in that he was qualified for promotion, there were vacancies, he was not promoted, and whites were promoted. See e.g. Higgins v. State of Okla. Ex. Rel. Okl. Emp. Sec., 642 F.2d 1199, 1201 (10th Cir. 1981). Harris-Teeter stated that the promotees were more qualified, Mobley was on strike when Allison was promoted, and Mobley was in a different department/shift. Standing alone, each reason is legitimate and non-discriminatory. Considering all of the evidence, said reasons are pretextual. Mobley was more qualified than the promotees because of his job experience, including "fill-in" leadman duties and performance. He was never considered for the Allison and Givens leadman openings. Allison was promoted some 8 weeks after Mobley informed the company that he was available for

work. The same shift/same department defense for not promoting Mobley to the "defacto leadman" position of Jeff Fowlkes is invalid because of the way the practice was applied, and the adverse impact of said application upon blacks. See Finding 16. Finally, this conclusion is supported by the nature of the promotion system at Harris-Teeter and its adverse impact upon blacks. Mobley was denied promotions received by Givens, Allison, and Fowlkes because of his race.

(f) Jerome Gary has proved a prima facie case by showing that he was neither promoted nor transferred; he sought the positions; there were vacancies; he was qualified; and, whites received said positions. Harris-Teeter's reasons for neither promoting Gary (not qualified) nor transferring (never asked) standing alone, are legitimate, non-discriminatory. Considering all

of the evidence, said reasons are pretextual. The Court resolved the credibility issue of whether Gary asked for the sitdown lift in favor of Gary. In reference to the mechanic's position, Gary was more qualified than the selectees because of his education and job training. The statistical evidence in Finding 26 also supports this conclusion. Finally, this conclusion is supported by the nature of the promotion system at Harris-Teeter and its adverse impact upon blacks. Gary was denied a transfer to the sitdown lift and a promotion to mechanic because of his race.

(g) Christopher McKinney has proved a prima facie case in that he was qualified for a promotion, there were vacancies, he was not promoted, he expressed an interest in promotion, and whites were promoted. Harris-Teeter stated that it did not promote McKinney because he was not qualified, and

he was on strike when the positions were filled. Standing alone, each reason is legitimate and non-discriminatory. Considering all the evidence, said reasons are pretextual. A Harris-Teeter witness testified that McKinney was not qualified because of his poor work record and that persons received warnings when they had a poor work record. McKinney did not have any warnings. McKinney was more qualified than either promotee because of his greater departmental and supervisory experience. McKinney informed Harris-Teeter of his availability for employment before either position was filled. McKinney worked in the same department and on the same shift as each of the openings. Each promotee crossed either a departmental or shift line to receive the promotion. This violated the same shift/department rule. Finally, this conclusion is supported by the nature of the

promotion system and its adverse impact on blacks. McKinney was denied the promotions received by Fowlkes and Weaver because of his race.

(h) Roy Torrence has proven a prima facie case in that he was qualified for promotion, he expressed interest in promotion, he was not promoted, there were vacancies, and whites were promoted. Harris-Teeter stated that it did not promote Torrence because he did not ask for a position, and he was a poor employee. Standing alone, each reason is legitimate and non-discriminatory. Considering all of the evidence, said reasons are pretextual. Torrence asked for a promotion. He was told he would never be promoted. Torrence was rated as an excellent employee. He had prior supervisory experience. He was never considered for the Mitchell position. He was more qualified than either of the promotees (Mitchell,

Hanson). He trained Mitchell. The criteria utilized in the Hanson promotion were subjective. Finally, the conclusion is supported by the nature of the promotion system and its adverse impact upon blacks. Torrence was denied promotion to the positions received by Mitchell and Hanson because of his race.

(i) Roosevelt Patterson has established a prima facie case in that he was qualified for various promotions, he was not promoted, he asked to be promoted, there were vacancies, and whites were promoted. Harris-Teeter stated that it did not promote Patterson because he left a position, he was not in the same department or on the same shift as the openings, he was not qualified, and he was on strike when the positions were filled. Standing alone, each reason is legitimate and non-discriminatory. Considering all of the evidence, each reason is

pretextual. Patterson was more qualified than the promotees. Patterson left the receiver's job because he was denied assistance. The record evidence shows that generally 2 whites performed this job and Patterson performed it alone. He was never considered for any of the promotions. The same shift/same department rule is pretextual. See Finding 16, supra. Patterson was qualified for said positions because of his experience and performance. The positions were filled either before Patterson went on strike or after he notified the employer he was available for work. Finally, the nature of the promotion system and its impact upon blacks supports this conclusion. Patterson was denied the positions listed in Finding 29 because of his race.

(j) Curtis Jones established a prima facie case in that he asked for the position of rail unloader twice, he was qualified,

he did not receive said position, there were vacancies, and whites were hired. Harris-Teeter stated that it did not promote Jones because of his back problem. Said reason, standing alone, is legitimate and non-discriminatory. Considering all of the evidence, the reason is pretextual. His back problems were minor. The supervisor never asked him about the problem. He was transferred to the salvage dock where the items he moved were similar in size to those moved by a rail unloader. In 1976 Harris-Teeter hired seven whites and no blacks in loader/unloader positions. Jones was more qualified than the hirees. Finally, this conclusion is supported by the nature of the promotion system and its adverse impact on blacks. Jones was denied the rail unloader positions because of his race.

(k) John Thomas Johnson -- Johnson was employed in February of 1975 as a picker

and lift operator in the meat department and later in the produce department. He was qualified and available for the lead job and for the foreman job to which Jeff Fowlkes was promoted. Fowlkes was slotted into the lead man's job in October of 1976, and received the actual job title in November 1976. Johnson's complaint as to Fowlkes (and as to David Allison and Clyde Kiker) relates to promotions which occurred in April, 1977 (Fowlkes); May, 1977 (Allison); and August, 1977 (Kiker). Although Johnson was available and qualified from the time he abandoned the strike in February of 1977, he did in fact turn down a night job at $4.80 so that he could stay in a day job at $3.90 and look after his children. (His actual testimony on this issue was evasive, and it was only after some prodding from the court that he ever gave a clear answer about the "family reasons" which moved him to reject

the higher paying job). Defendant says that his turning down the night shift work was the reason he was not considered for promotion. I am not sure that I ought to take that reason at face value, but I am unable to conclude that it was solely pretext. Relief will not be ordered for John Thomas Johnson.

(1) Frank Sullivan proved a prima facie case by showing that he was qualified for various promotions, he was not promoted, there were vacancies, and whites were promoted. Harris-Teeter stated that it did not promote Sullivan because he left the foreman trainee program, was less qualified than the promotees, and was on a different shift than a vacancy. Each reason, standing alone, is legitimate and non-discriminatory. Considering all of the evidence, they are pretextual. Sullivan was more qualified than the promotees because of his experience,

including that of leadman. His leaving the foreman training program as a defense is unworthy of credence. The same shift/department reason lacks credence. See Finding 16. Finally, the nature of the promotion system and its adverse impact on blacks supports this conclusion. Sullivan was denied the promotions received by Kiker and Hamilton because of his race.

(m) Kenneth Bailey established a prima facie case in that he was qualified for promotions, there were vacancies, he was not promoted, and whites were promoted. Harris-Teeter stated that Bailey was not promoted because he was not as well qualified as the promotees. Standing alone, this reason is legitimate and non-discriminatory. Considering all of the evidence, said reason is pretextual. Bailey was more qualified than each promotee because he had greater departmental experience and

performed a broader range of duties. Finally, this conclusion is supported by the nature of the promotion system and its adverse impact on blacks. Bailey was denied the positions received by McClain and Carpenter because of his race.

(n) John LeGrand established a prima fcie case by showing that he was qualified for several promotions, there were vacancies, he was not promoted, and whites were promoted. Harris-Teeter stated that it did not promote LeGrand because he was on strike when Fowlkes was promoted; in a different department or shift than the vacancy, and less qualified than the promotees. Standing alone, each reason is legitimate and nondiscriminatory. Considering all of the evidence, said reasons are pretextual. LeGrand was more qualified than the promotees because of his prior experience. He had more loading experience than Fowlkes.

Fowlkes assumed the defacto leadman duties before the strike. The same shift/department reason is invalid for the reasons set forth in Finding 16. Finally, this conclusion is supported by the nature of the promotion system and its adverse impact on blacks. LeGrand was denied the promotions received by Fowlkes, Dover, and Givens because of his race.

(o) Harris-Teeter advanced its "same shift/same department" policy as a reason for failing to promote various claimants. Said reason is pretextual. See Finding 16. It is unworthy of credence. The policy was applied only to black employees. The testimony as to its scope was conflicting. The only persons denied promotions because of its application were blacks. This evidence showed that the practice had an adverse impact upon blacks and resulted in differentic' treatment for black employeees (e.g.

blacks could not cross shift/department lines, although whites did).

(p) The employer cannot be required to show that the selectee was more qualified than the claimant. Burdine, supra. However, when the employer chooses as its defense the allegedly superior qualifications of the selectee, then that evidence should be subjected to the same treatment as any other evidence when all of the evidence is examined to see if pretext is present. Harris-Teeter utilized the qualifications of various selectees as a defense. That reason is pretextual because many of the comparisons involved claimants who were never considered at the time of the promotion. The "comparisons" were prepared solely for litigation and were retrospective in nature. The comparisons and the witnesses espousing them were not credible. Harris-Teeter did not regularly evaluate the job performance of

its employees. The criteria utilized in employment decisions were unwritten and subjective. The claimants were more qualified when a credible comparison is made.

12. The defendant has intentionally discriminated against each of the prevailing plaintiffs because of his race in violation of 42 U.S.C. §§1981 and 2000e et seq. The defendant discriminated against the class on the basis of race in promotions and discharges between 7/24/74, and 2/20/80, in violation of 42 U.S.C. §2000e et seq. Having found that some of the plaintiffs and class members suffered from defendant's unlawful, racially discriminatory employment practices, the Court must now devise appropriate remedies. The remedies should, so far as possible, place the plaintiffs and class members in the positions they would have occupied but for defendant's discriminatory practices. The relief should include

appropriate injunctive relief and back pay. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 422 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 771 (1976); Chisholm v. United States Postal Service, supra.

13. Plaintiffs Porter, Reed, Lilly, Gregory, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Sullivan, Bailey and LeGrand have sustained losses of pay as a result of defendant's practices. They are entitled to injunctive relief and back pay. The Court concludes there is no equitable or other basis for denying such relief. Because appropriate vacancies may not be readily available, the plaintiffs (except Patterson, Gary, and Reed) and other class members may also be entitled to front pay - future pay at the rate of the positions they were wrongfully denied - until they are placed in a job of equal or higher pay.

Patterson v. American Tobacco Co., 535, F.2d 257, 269 (4th Cir. 1976), cert. den. 429 U.S. 639 (1977); James v. Stockham Valves & Fitting Co., 559 F.2d 310, 356-358 (5th Cir. 1977), cert. den. 434 U.S. 103 (1978); White v. Carolina Paperboard Co., 564 F.2d 1073, 1091 (4th Cir. 1977). Defendant should be enjoined to reinstate or place these plaintiffs (except for Reed, Patterson, and Gary) and class members in the job positions they would now occupy but for the unlawful practices as found herein.

Plaintiffs and the class are also entitled to an injunction prohibiting defendant from discriminating against black employees in promotion and discharge. Franks v. Bowman Transportation Co., supra.

Additionally, class members who have suffered from the above practices are entitled to be placed in their rightful job positions, including reinstatement where

appropriate, at the first vacancy. Franks, supra. "Bumping" or displacement of incumbent employees will not be ordered. Patterson, supra; Sledge v. J. P. Stevens & Co., Inc., supra. Rather, class members will be awarded front pay until vacancies occur and they can take their rightful positions. Creswell v. Western Airlines, Inc., 514 F.Supp. 384, 394 (C.D. Cal. 1981).

14. Pursuant to Rule 53, FRCP, the Court will appoint a Special Master to receive evidence from the parties and to make recommendations regarding the relief that should be awarded with respect to the individual claims of plaintiffs and class members. The Master need not consider the entitlement of Porter, Lilly, Gregory, Mobley, Gary, McKinney, Reed, Torrence, Patterson, Jones, Johnson, Sullivan, Bailey, and LeGrand to relief. Rather, the Master will accept the determinations that

they have or have not been discriminated against in the manner indicated and will receive evidence and make recommendations only with respect to the relief that should be awarded. With respect to other class members, the Master will receive evidence and make recommendations on their entitlement to relief as well as the relief that should be awarded. Class members are presumptively entitled to relief. They need only demonstrate that they are members of the class who sought promotion or were discriminately discharged and to provide information regarding their loss of earnings. Teamsters, supra; Sledge, supra. Defendant then has the burden of demonstrating by the preponderance of the evidence "that factors other than the condemned discrimination caused the decisions" of which the class members complain. Sledge, supra at 637.

15. Interest on back pay should be awarded. Brown v. Coleman-Cocker, 16 F.E.P. 1046, 1051 (W.D.N.C. 1975). This interest should be awarded at the "adjusted prime rate" used by the IRS in cases of income tax refunds or penalties. See EEOC v. Pacific Press Publishing Assn., 482 F.Supp. 1291, 1319-1320 (N.D. Cal. 1979). This interest shall be compounded monthly.

16. Plaintiffs are also entitled to appropriate injunctive relief and reporting provisions to insure the discriminatory practices found herein do not recur. See United States v. County of Fairfax, 629 F.2d 932, 942 (4th Cir. 1980).

17. Plaintiffs are the prevailing parties and are entitled to their legal costs, reasonable expenses, attorneys'

fees, and expert witnesses fees. 42 U.S.C. §§2000e-5(k) and 1988.

This the 12 day of July, 1982.

s/James B. McMillan
JAMES B. McMILLAN
United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-76-191

PAUL LILLY, individually and on behalf of all others similarly situated, Plaintiff, and CHRISTOPHER McKINNEY, PHILIP REED, JOHN LeGRAND, KEN BAILEY, FRANK SULLIVAN, JAMES MOBLEY, SHIRLEY GATEWOOD, JEROME GARY, CURTIS JONES, WOODROW McMANUS, ROY TORRENCE, HAZEL FISHER, JOHN JOHNSON, WILLIE HUNT, MICHAEL McVAY, ROOSEVELT PATTERSON, WILLIE COVINGTON, WILLIAM CARROTHERS, TREVESANT GOODWIN, and RICHARD BURCH, individually and on behalf of all others similarly situated, Plaintiffs-Intervenors, vs. HARRIS-TEETER SUPERMARKET, a corporation, Defendant.	)	JUDGMENT

C-C-79-130

RICHARD GREGORY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

C-C-79-137

EDWARD PORTER,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

JUDGMENT

This matter having come on for trial before the Court sitting without a jury and the issues having been duly tried and Findings of Fact and Conclusions of Law having

been entered, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This proceeding is certified as a class action under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The class is defined as:

Plaintiffs Lilly, Gregory, Reed, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Johnson, Gatewood, Sullivan, Bailey and LeGrand; and all blacks currently employed by Harris-Teeter at its warehouse and store numbers 1, 2, 5, 8, 9, 22, 39, 52, 53, 55, 59, 62, 66, and 83, located in Mecklenburg County; and all blacks employed by Harris-Teeter at (at said warehouse and stores) at any time since July 20, 1974 who are not currently employed, all of whom may have been or may be subjected to racial discrimination by Harris-Teeter in its employment policies and practices in reference to terminations and promotions.

The Court is entering with this Judgment a separate Order of Reference to a Special Master, which requires that appropriate notice be served on all class members.

2. Within ten (10) days from the date of this Judgment, the defendant is directed to post a copy of this Judgment on each bulletin board or other public place at each store and the warehouse in Mecklenburg County. The Judgment shall remain posted for sixty (60) days. The defendant shall certify to the Court within fifteen (15) days following the last date of publication that it has complied with this provision of the Judgment.

3. The defendant, Harris-Teeter Supermarkets, and all persons in active concert or participation with it are permanently enjoined and restrained from discriminating against the plaintiffs and members of their class as herein described on the

basis of their race in promotion and discharge.

4. The defendants shall, within ten (10) days from the date of this Judgment or as soon as vacancies develop in appropriate job positions, reinstate or offer reinstatement, promotion or employment to the following plaintiffs:

Edward Porter
Paul Lilly
Richard Gregory
James Mobley
Christopher McKinney
Roy Torrence
Curtis Jones
Frank Sullivan
Kenneth Bailey
John LeGrand

Lilly is to be reinstated in the warehouse in the position or equivalent thereto, he had when he was terminated. Gregory is to be reinstated as a grocery manager or an equivalent position at a store located in Mecklenburg County. Mobley, McKinney,

Torrence, Jones, Sullivan, LeGrand, and Bailey shall be promoted or offered promotions to the job positions they requested or to job positions to which they would now be assigned had they been promoted to the job positions the Court has found they were discriminatorily denied. Porter shall be offered employment as a truck driver. If the parties are unable to agree within thirty (30) days from the date of this Judgment on the job positions which the above plaintiffs should be offered or to which they should be promoted or assigned, this issue shall be referred for appropriate recommendations to the Special Master to be appointed by separate order.

5. The defendants shall pay back pay to plaintiffs Porter, Lilly, Reed, Gregory, Mobley, McKinney, Gary, Torrence, Patterson, Jones, Sullivan, Bailey, and LeGrand for any loss of pay they have sustained

because of defendant's employment practices found herein to have been unlawful. Their loss of pay shall be based on the differences in their earnings from the dates of defendant's discriminatory practices until these plaintiffs have been reinstated, offered employment or promotion or assigned to job positions as herein provided. The amounts awarded shall represent the difference between what they would have earned had they not been discriminated against and what they have earned or should have earned through reasonable diligence. Except for Reed, Gary, and Patterson, who are no longer employed or available for employment by defendant, they shall also be awarded front pay until they have been placed in the job positions as directed herein. The amount of back or front pay to be awarded to these plaintiffs and class members shall be

referred to the Special Master for recommendations.

6. Other members of the class, who are found by the Special Master to have been discriminatorily denied promotions or discharged, are also entitled to relief. They shall be reinstated in employment promoted or transferred or employed where appropriate, and assigned to the job positions they would now occupy but for defendant's discrimination. They shall be awarded any loss of earnings they suffered as a result of defendant's racially discriminatory practices. The issues regarding the appropriate relief to be awarded to class members shall also be referred to the Special Master.

7. In proceedings before the Master, class members are entitled to a rebuttable presumption of liability based on their membership in the class. They may be awarded back pay from January 29, 1973, until they

have been placed in the job positions they would now occupy had they not been subjected to defendant's racially discriminatory employment practices. The Special Master shall receive evidence from the interested parties, and based on the instructions in the separate order of reference, shall make proposed findings and recommendations with respect to any injunctive relief and the amount of back pay, together with adjustments in fringe benefits and interests each class member shall receive. The Master shall receive evidence and make recommendations regarding any front pay that should be awarded to class members.

8. Plaintiffs and members of the class are awarded adjustments in fringe benefits to reflect what the fringe benefits would have been in the absence of defendant's discriminatory practices. They shall also be awarded interest from the date of the

discriminatory acts of the defendant calculated at the "adjusted prime rate" used by the Internal Revenue Service in cases of income tax refunds or penalties compounded monthly. The Master shall receive evidence from the interested parties, and based on the Court's instructions, shall make proposed findings and recommendations with respect to any adjustments in fringe benefits and the interest that should be awarded to plaintiffs and individual class members.

9. Within six (6) months from the date of this Judgment, defendant shall also take the following steps to eliminate remaining effects of their discriminatory practices:

Defendants shall:

(a) Post notices of all non-management openings at the stores and warehouse as well as openings in entry level management, professional, and supervisory positions. Employees are to be given three business days to bid on such vacancies. The notice must contain a brief description of the job, duties of the job, pay rate, and the name of the person to whom the employee is to submit his or her bid. The defendant is to maintain a list of employees who submit bids. This list is to be used as a source of filling future vacancies.

(b) Canvass the class members herein described and determine if they are interested in and are qualified for professional, technical, para-professional, skilled management, and supervisory job positions. This canvassing is only to use license and registration requirements, length of service, job performance and other job related criteria to determine if black employes are qualified. A list of names of those qualified shall be maintained and updated once every six months during the period the Court

retains jurisdiction of this action. Interested class members who are not qualified for job positions in which they express an interest shall be informed in writing and shall be advised what they need to do in order to qualify.

(c) Establish job descriptions for all store and warehouse positions and establish objective, job related criteria for the selection of candidates for the position.

(d) Establish job related criteria for the evaluation of job performances of all non-management employees at the stores and warehouse.

(e) Do not limit the consideration of warehouse promotion candidates to the employees on the same shift and in the same department where the vacancy is.

(f) Systematically record the job experience of all employees at the stores and warehouse.

10. Within six (6) months from the date of this Judgment, defendant shall provide the Court and plaintiffs' counsel with the following reports:

(a) the number of white and black employees assigned to each job and department of each store and the warehouse;

(b) the name of each class member who has been promoted or transferred since the date of this Judgment, the job position and rate of pay of the position to which the class member was transferred and his or her previous job position and rate of pay;

(c) the name of each class member whose request for promotion or transfer was denied and the reason or reasons for the denial;

(d) the name of each class member who has been involuntarily discharged since the date of this Judgment, the date of the discharge and the reason or reasons therefor (Defendant shall retain records

of each class member who has been involuntarily discharged.);

(e) the name of each class member who has expressed an interest in job positions listed in paragraph 9 above, the job position requested and who has been included in the list of employees who are to be considered for future vacancies;

(f) the name of each class member who has expressed an interest in the job positions listed in paragraph 9 who has been determined by defendant to be unqualified and the reason or reasons for the determination.

Defendant shall provide the Court and plaintiffs' counsel with additional reports covering the above subjects every twelve (12) months thereafter during the Court's retention of jurisdiction of this action.

11. Defendant shall file a report with the Court within forty-five (45) days from the date of this Judgment, and shall serve copies of same on plaintiffs' counsel,

certifying defendant's compliance with paragraph 4 of this Judgment and shall indicate the job positions offered to or to which the plaintiffs and class members listed in paragraph 4 have been assigned or promoted, together with the date of the offer or assignment. If a plaintiff or class member rejects the offer, defendants shall indicate the date of the rejection.

12. Defendant shall designate an individual who will be responsible for preparing and submitting the reports provided for in this Judgment and for insuring compliance by defendants with all provisions herein. The name, job title, and address of the person designated shall be provided to the Court and as counsel within thirty (30) days from the date of this Judgment.

13. Plaintiffs are the prevailing parties in this action. The defendant shall pay plaintiffs' reasonable attorney fees,

costs and expenses, including expert witness and consultation fees, paralegal time and unusual clerical time for all work performed in this proceeding until the date of this Judgment in accordance with the accompanying Memorandum of Decision as to Fees.

14. Plaintiffs' counsel shall also receive reasonable attorney fees, costs, and expenses, including paralegal time and other proper expense, for all future work done on behalf of the plaintiffs and class members for all proceedings before the Special Master and for work done in the implementation of this Judgment, including fees and expenses for monitoring and examining the various reports required, in answering questions of class members and in investigating any alleged violations of this Judgment.

15. The following 42 U.S.C. §1981 claims are dismissed because of the Statute of Limitations defense:

CLAIMANT	POSITIONS CLAIMED
James Mobley	Terry Givens
Jerome Gary	N. Mitchell
Roy Torrence	N. Mitchell
Roosevelt Patterson	T. Givens
Roosevelt Patterson	N. Mitchell
Curtis Jones	J. Lamb
John LeGrand	D. Dover
John LeGrand	T. Givens

16. The claims of Hazel Fisher, Shirley Gatewood, Mack Ervin, William Carrothers, Barbara Anderson, Austin Pharr, Tresevant Goodwin, Woodrow McManus, Therrell McMoore, Richard Burch, and Philip Reed (terminated) have been previously dismissed with prejudice by the Order filed June 7, 1981.

17. The claim of Willie Covington was dismissed, with prejudice, at trial, on defendant's motion. He did not testify at trial.

18. The claim of John Johnson is dismissed with prejudice by the Amended Memorandum of Decision filed June 25, 1982.

19. The Court will retain jurisdiction of the action for three (3) years from the entry of this Judgment. The status of the action will be reviewed at that and the action will be dismissed unless the court finds it necessary to retain jurisdiction for further orders.

This the 12 day of July, 1982.

s/James B. McMillan
James B. McMillan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-76-191

PAUL LILLY, individually and on behalf of all others similarly situated,

Plaintiff,

and

CHRISTOPHER McKINNEY, PHILIP REED, JOHN LeGRAND, KEN BAILEY, FRANK SULLIVAN, JAMES MOBLEY, SHIRLEY GATEWOOD, JEROME GARY, CURTIS JONES, WOODROW McMANUS, ROY TORRENCE, HAZEL FISHER, JOHN JOHNSON, WILLIE HUNT, MICHAEL McVAY, ROOSEVELT PATTERSON, WILLIE COVINGTON, WILLIAM CARROTHERS, TREVESANT GOODWIN, and RICHARD BURCH, individually and on behalf of all others similarly situated,

Plaintiffs-Intervenors,

vs.

HARRIS-TEETER SUPERMARKET, a corporation,

Defendant.

ORDER ON REFERENCE TO A MASTER

C-C-79-130

RICHARD GREGORY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

C-C-79-137

EDWARD PORTER,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

ORDER ON REFERENCE TO A MASTER

The Court hereby refers this action to a Master, designated herein, for hearings, findings and recommendations concerning monetary relief to be awarded Edward Porter, Philip Reed, Paul Lilly, Richard

Gregory, James Mobley, Christopher McKinney, Jerome Gary, Roy Torrence, Roosevelt Patterson, Curtis Jones, Frank Sullivan, Kenneth Bailey, John LeGrand, and appropriate injunctive and monetary relief, if any, to class members who file timely claims. This order is entered pursuant to the Findings of Fact, Conclusions of Law, and Judgment previously entered in this action.

1. Pursuant to Rule 53 of the Federal Rules of Civil Procedure, _____, of Charlotte, North Carolina, is hereby appointed as Master to make findings and recommendations for the appropriate relief to be awarded to plaintiffs and to class members who file claims.

2. The Master shall expeditiously schedule discovery, if any is needed, and conduct hearings in order to make recommendations as provided herein. The Master, in consultation with counsel for the parties,

shall develop a discovery schedule and shall set the dates, times and locations of the hearings to be held before the Master.

3. Counsel for the parties shall be allowed to conduct discovery as provided by Rules 26-37 of the Federal Rules of Civil Procedure in order to prepare for the hearings before the Master. Within thirty (30) days from the date all individual claims are filed, the Master shall hold a conference with counsel for the parties and schedule the time for completion of discovery and for the determination of all discovery motions. The Master shall also schedule at the earliest convenient time the dates and times for the hearings.

4. Within 60 days from the date of this Order, the defendant, Harris-Teeter Supermarkets, Inc., shall mail, by certified mail, a copy of the NOTICE TO CLASS MEMBERS (herein "Notice") to the last known

addresses of the plaintiffs and to all class members and shall post a copy of the Notice on each bulletin board or other public place at each store and the warehouse in Mecklenburg County for sixty (60) days.

5. The defendant shall also cause a copy of the Notice to be published once, no later than 60 days from the date of this Order, in the Charlotte Observer and the Charlotte Post.

6. Counsel for the defendant shall within ten (10) days following the mailing provide counsel for the plaintiffs and the clerk with a list of the names and addresses of all persons to whom copies of the Notice have been mailed and shall keep plaintiffs' counsel advised of all undelivered mailings.

7. The Master will receive evidence and make findings with respect to the claims of each individual named and each class member filing a claim with respect to any

alleged discrimination in promotion or involuntary termination at any time from July 24, 1974 to February 21, 1980. The Master shall make specific findings and recommendations with respect to each claim and shall also recommend appropriate relief.

8. In order to aid the Master in his determination, counsel for the plaintiffs shall file with the Master a statement of claim on behalf of each individual and class member, indicating the specific act(s) of discrimination, the date of the discriminatory act and the earnings of the class member or individual from the date of the discriminatory act. The statement of claim shall be filed within sixty (60) days from the date of the completion of discovery. Counsel for defendant shall respond to each statement of individual claims within thirty (30) days after receipt of plaintiffs' statements. The parties shall meet to agree on

the issues with respect to each claim. If no agreement is reached, each party shall file its statement of issues for each claimant.

9. Promotions as used herein shall include the movement or reassignment of an individual from a lower pay grade to a higher pay grade.

10. Vacancies shall include the filling of job positions by new employees, the hiring or assignment of incumbent employees to new positions within the stores and warehouse located in Mecklenburg County.

11. The Court has previously determined that Porter, Reed, Lilly, Gregory, Mobley, Gary, McKinney, Torrence, Patterson, Jones, Sullivan, Bailey, and LeGrand were discriminated against and denied employment or promotions or were discharged unlawfully. With respect to these individuals the Master shall receive evidence and

make findings and recommendations regarding their loss of pay and fringe benefits. With respect to other class members, the Master, after determining the job positions and salary, if any, they were denied because of race or other discriminatory practices to which they were subjected, shall make findings and recommendations with respect to their loss of income and other relief to which they are entitled.

12. The Court has already found that the defendants followed a pattern and practice of discrimination in promotions and involuntary terminations against black employees between July 4, 1974 and February 20, 1980. Once a class member shows that he is black, sought promotion, or would have sought promotion and was qualified to promote, or was involuntarily discharged, he or she will be presumptively entitled to an award of back pay based on the date the

discriminatory act occurred. The defendant may offer evidence regarding the class members' qualifications or the qualifications of the persons selected, the non-availability of the class members, the infractions of the company rules by the claimant or other evidence which will aid the Master in determining whether the class member has suffered from discriminatory practices of defendant because of race or color. The class members may offer evidence in rebuttal or otherwise to show that the defendant's explanation is pretextual. The Master shall base his recommendations on the facts he finds and applicable law.

13. The Master shall add pre-judgment and post-judgment interest to each monetary award at the rate set forth in the Judgment.

14. In each instance where the Master finds that a class member or individual was discriminated against unlawfully or

unlawfully discharge or forced to terminate his or her employment, the Master shall receive evidence and make findings and recommendations as to any front pay the class member shall receive until placed in his or her rightful place. The Court has already enjoined the defendants to pay front pay to Porter, Lilly, Gregory, Mobley, McKinney, Torrence, Jones, Sullivan, Bailey, and LeGrand. The Master shall make findings and recommendations as to the front pay that should be awarded to these plaintiffs and class members.

15. The Master shall receive evidence and make findings and recommendations with respect to the injunctive relief that each class member and individual shall receive. The Court has previously awarded injunctive relief to Porter, Lilly, Gregory, Mobley, McKinney, Torrence, Jones, Sullivan, LeGrand, and Bailey. The Master may receive

evidence and make findings and recommendations with respect to any additional injunctive relief that should be awarded to these individuals.

16. The following are general rules which should govern the Master's determinations:

(a) Facts found and conclusions of law reached by the Court will be accepted by the Master and will not be relitigated. The Master should familiarize himself with the Findings of Fact and Conclusions of Law and Judgment.

(b) In determining the class members who applied for promotion or transfer or who would have applied but for the defendant's practices, the Master must follow the decision of the Supreme Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

(c) In determining entitlement and back pay, front pay, and fringe benefits, the Master shall follow the instructions set out in Teamsters, supra; White v.

Carolina Paperboard Co., 564 F.2d 1073 (4th Cir. 1977), Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1975); and Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978). If the instructions set out in these opinions do not answer all questions that arise, the Master shall follow applicable law. Defendant shall be allowed to show the interim earnings of claimants any lack of diligence on their part to earn reasonable wages. Unemployment compensation, welfare payments, and the like shall not be set off against back pay, front pay, and fringes owed.

(d) The Master may require either party to submit such additional data or information as may be necessary or helpful for the Master's determination.

(e) This Order does not preclude agreement otherwise between the parties. Such agreement is encouraged.

(f) Proceedings before the Master shall not be stayed except by order of the Master or order of the Court.

Application by a party for action by the Court does not stay proceedings before the Master.

(g) The Federal Rules of Civil Procedure and of Evidence shall govern proceedings before the Master. The Master may hold such other hearings and issue such other orders as may be appropriate for the orderly and efficient performance of his duties and are not inconsistent with prior orders of this Court or controlling case law.

17. All costs, counsel fees, and expenses incurred by plaintiffs and class members, and the fees and expenses of the Master, which are necessary and reasonable for the proceedings before the Master, shall be taxed against the defendant. The Court will determine reasonable fees, costs, and expenses upon motion of counsel.

18. This Order may be corrected or amended as the Court may find appropriate.

This the 12 day of July, 1982.

s/James B. McMillan
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-76-191

PAUL LILLY, individually and on behalf of all others similarly situated,

Plaintiff,

and

CHRISTOPHER McKINNEY, PHILIP REED, JOHN LeGRAND, KEN BAILEY, FRANK SULLIVAN, JAMES MOBLEY, SHIRLEY GATEWOOD, JEROME GARY, CURTIS JONES, WOODROW McMANUS, ROY TORRENCE, HAZEL FISHER, JOHN JOHNSON, WILLIE HUNT, MICHAEL McVAY, ROOSEVELT PATTERSON, WILLIE COVINGTON, WILLIAM CARROTHERS, TREVESANT GOODWIN, and RICHARD BURCH, individually and on behalf of all others similarly situated,

Plaintiffs-Intervenors,

vs.

HARRIS-TEETER SUPERMARKET, a corporation,

Defendant.

ORDER

C-C-79-130

RICHARD GREGORY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

C-C-79-137

EDWARD PORTER,

Plaintiff,

vs.

HARRIS-TEETER, a corporation,

Defendant.

On July 15, 1982, plaintiffs moved to amend the judgment and order of reference to a master entered on July 13, 1982, to provide that the closing date for the class be set at July 13, 1982, rather than the date of trial.

The court requested defendant, by August 6, 1982, to state its objections, if any, to the motion. Defendant has not filed any objections.

It appears to the court that plaintiffs' motion is proper, in light of Chisholm, et al. v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981), and that it will promote the most efficient resolution of class members' claims.

IT IS THEREFORE ORDERED that the judgment and order of reference to a master entered on July 13, 1982, be amended as follows:

1. Judgment: In paragraph one, the following shall be added to the end of the class definition:

"The closing date for the class is July 13, 1982."

2. Order of Reference: In paragrpah seven, line four, that "from July 24, 1974

to February 21, 1980" be changed to "from July 24, 1974 to July 13, 1982."

This 11 day of August, 1982.

s/James B. McMillan
James B. McMillan
United States District Judge

Supreme Court, U.S.
MAR 30 1984

No. 83-1474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRIS-TEETER SUPER MARKETS, INC.,

Petitioner,

vs.

PAUL LILLY, individually and on behalf of all others similarly situated,

and

CHRISTOPHER McKINNEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS LILLY, ET AL. IN OPPOSITION TO PETITION

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NO. 83-1474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HARRIS-TEETER SUPER MARKETS, INC.,

Petitioner

VS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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42 U.S.C. § 2000e *et seq.* 1

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

INTRODUCTION

A Writ of Certiorari should not be granted because: (a) The District Court and the Appellate Courts properly applied well-established law to the facts of this case, (b) The petitioner has failed to advance a single valid reason for the granting of a Writ, and; (c) The Petition is an unsupported criticism of the development of employment discrimination law by this Court.

I.

COUNTER STATEMENT OF THE CASE

A. Actions of the District Court.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq.[1] and

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[1] Hereinafter referred to as the Act. The petitioner's argument is limited to the interpretation of the Act.

42 U.S.C. § 1981. The respondent Lilly alleged retaliatory discharge for protesting racial discrimination at petitioner's Charlotte, North Carolina Distribution Center (59, 73-74).[2] Approximately twenty-five (25) persons intervened in the action. The intervenors had promotion, transfer, hiring, and termination claims (69-99, 130-132). A class was certified in July, 1977 (99-100). After the trial on the merits and prior to the entry of the judgment, the class was redefined to include only the employment practices of termination and promotion. The geographical scope consisted of the petitioner's warehouse and fourteen (14) stores located in Mecklenburg County (Charlotte), North Carolina. The successful plaintiffs

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[2] Undesignated numbers enclosed by parentheses refer to pages in the Appendix which accompanied petitioner's Petition.

were certified as class representatives (106-107). The District Court ruled against approximately half of the plaintiffs (11) and ruled in favor of the other half on their individual claims. Among others, Lilly (termination) and Gregory (constructive discharge) prevailed (69-99). Class-wide discrimination was found in promotions (115-120) and involuntary terminations (107-115).[3]

The District Court found, in reference to the involuntary termination practice, that (107): (i) the only written description of the policy or practice was a series of "Don'ts" which may or may not result in discipline or discharge; (ii) the system varied from one supervisor to another; (iii) an employee could

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[3] As the petitioner limits its Petition to the termination issue (Petition at pp. 1-2, 8), there will be no detailed description of any evidence other than the termination practice.

be terminated with or without prior warnings, and; (iv) the supervisory work force was overwhelmingly white.

The statistical findings of the District Court (107-113) were:[4] (a) blacks were involuntarily terminated between 1974-1978 at a rate of nine or ten standard deviations higher than one would expect given their presence in petitioner's workforce (110-112); (b) the petitioner, as noted by the lower courts, never offered an explanation for the substantial disparities (41, 114); (c) in 1975 blacks were involuntarily terminated at a rate of four (4) standards higher than one would expect

[4] The statistical test used was the standard binomial distribution test which was approved by this Court in Hazlewood School District v. United States, 433 U.S. 299, 311-312, n. 17 (1977) and Castaneda v. Partida, 430 U.S. 482, 496-497, n. 17 (1977). Attached hereto as Appendix A is a detailed description of the statistical findings.

given their presence in petitioner's workforce (113); (d) in 1974 fourteen percent (14%) of the petitioner's white workforce was involuntarily terminated, while the corresponding black percentage was twenty-five percent (25%)(109); (e) between 1974 and 1978, twenty-one percent (21%) of all white terminations were involuntary as compared to thirty-seven point two percent (37.2%) of all black terminations (108),[5] and; (d) between 1974 and 1978, the petitioner's white workforce increased from 1,546 persons to 2,372 persons. This is an increase of 53.4%. During the same time period, the petitioner's black workforce decreased from 527 persons to 322 persons. This is a decrease of 38.9%.

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[5] These are the figures used by the petitioner throughout their Petition. The petitioner completely fails to mention the results of the statistical testing in its Petition.

The petitioner never offered an explanation as to why there was a large decrease in the black workforce and an even larger increase in the white workforce (128).

The District Court also found that (113-114): (i) white employees who were tardy were not terminated while black employees who were tardy were terminated; (ii) a black employee, without any prior written warnings, was demoted while a white employee received numerous written warnings before any action was taken against him; (iii) a white employee received a warning for tardiness after he was tardy sixteen (16) times in two (2) months, and; (iv) a white employee who missed 38.4% of the working hours between February 13, 1978 and April 4, 1978 and who had ten (10) unexcused absences between April 4, 1978 and June 19, 1978 had no warnings.

B. The Opinion of the Court of Appeals. The Court of Appeals, in summary,[6] (a) affirmed the class certification (21-32); (b) affirmed the finding of class-wide discrimination in involuntary terminations (36-41); (c) reversed the finding of class-wide discrimination in promotions (41-46); (d) affirmed the findings of individual claims of discrimination of three (3) individuals including a termination claim and a constructive discharge claim (49-52), and; (e) vacated and remanded for further consideration the individual promotion/transfer claims of discrimination of ten (10) other plaintiffs who prevailed in the District Court (46-49).

In discussing the class-wide ter-

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[6] The opinion is reported at 720 F.2d 326 (4th Cir. 1983).

mination issue, the Appellate panel discussed the statistical evidence. In doing so, it stated that the test results "ruled out chance as a cause of the disparity in the termination rates." (39-40). As a result of ruling out chance as the cause,

> . . . plaintiffs thereby made out a prima facie case of class-wide discrimination, thus shifting the burden to Harris-Teeter to come forward with a credible lawful explanation for the disparity. (40)

The panel also credited the District Court's findings that: petitioner's termination policy was highly discretionary; the policy, in specific instances, had been applied unevenly to blacks as against whites; whites, if at all, received warnings only after extensive absences or tardies while blacks were terminated for insubstantial reasons (40-41). It noted that Harris-Teeter never advanced a reason for the statisti-

cally significant disparities between the white and black termination rates (41). The panel further stated that:

> Harris-Teeter advanced no explanation for the disparity between the black and white termination rates, instead arguing that the plaintiffs' statistics "showed only that both blacks and whites had committed dischargeable offenses and had been discharged." That assertion is plainly incorrect, for the standard deviation analysis demonstrates that the significant disparity between the termination rates was not due to chance, but instead to some other cause (40). . . . that cause is presumed to be unlawful discrimination until the defendant shows otherwise, . . . and Harris-Teeter failed to to do so here (41).

II.

SUMMARY OF ARGUMENT

The lower courts, based upon overwhelming evidence of discrimination, properly applied the well-established law of this Court in finding and affirming intentional discrimination. The petitioner advances arguments which this Court has rejected in the past and

should reject again. The petitioner fails to advance a single valid reason for the issuance of a Writ. The petitioner describes the evidence incorrectly and fails to describe all of the relevant evidence. The petitioner is seeking to avoid the appropriate consequences of its failure to explain the gross disparities (in excess of nine (9) standard deviations) between the involuntary terminations of blacks and whites. The petitioner, without the support of a single valid reason, seeks to avoid the consequences of its discriminatory actions. Careful analysis of the facts and the applicable law reveal that the petitioner's arguments lack any merit.

III.

ARGUMENT

A. The Court of Appeals And the District Court Properly Applied Well-

Established Principles of Law to the Facts.

It must be stressed that the Petition does not challenge the findings of the District Court and does not challenge the validity of either the class certification or its affirmance.

The petitioner argues that "the subject of proof . . . is, as exemplified by the rulings of the courts below in this case, in a state of serious disarray which needs and requires correction and guidance from this Court." (Petition, pp. 22-23). In fact, there is no conflict among Circuit Courts of Appeal or violation of the case law established by this Court. There is no "disarray" except for that in petitioner's arguments.

The petitioner's assertion ignores the well-established law of the Act applied by the lower courts. In

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), this Court stated that:

> And because it alleged a system-wide pattern or practice . . . the Government had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice. 431 U.S. at 336.
>
> Statistics are equally competent in proving employment discrimination cases. 431 U.S. at 338.

See also Hazlewood, supra, 433 U.S. at 307-308. Gross statistical disparities alone can establish a prima facie case. Hazlewood, supra, 433 U.S. at 307-308 (citing Teamsters).

The respondents met their burden when they produced statistical evidence (of nine to ten standard deviations) which substantially exceeded the two to three standard deviations standard of Hazelwood. 433 U.S. at 309, f.n. 14. In addition

to the statistical evidence, the respondents produced evidence which shows that: (i) the black proportion of the petitioner's workforce decreased substantially over a four year period while the white proportion increased even more substantially; (ii) the termination policy lacked written criteria and guidelines; (iii) the discipline meted out to an individual was a function of the unfettered discretion of an overwhelmingly white supervisory workforce; (iv) there were specific instances of differential treatment between blacks and whites, and; (v) whites either received warnings only after long term consistent violations of the rules or else received no warnings at all after such violations.

The termination system's lack of written criteria and its control by an overwhelmingly white supervisory work-

force with unfettered discretion, when coupled with the significant statistical disparities, are features which have been condemned as badges of racial discrimination as well as perpetuating racial discrimination. See e.g., Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)(failure to provide clear criteria for selection or written job descriptions condemned); Brady v. Thurston Motor Lines, ____F.2d____, 33 FEP Cases 1373, 1374, 1379 (4th Cir. 1984)(absence of written job descriptions and qualifications, failure to post job openings, subjective nature of personnel decisions, and all white supervisory workforce); Carroll v. Sears, Roebuck and Company, 708 F.2d 183 (5th Cir. 1983)(unwritten, subjective criteria for promotion condemned); E.E.O.C. v. Ford Motor Company, 645 F.2d 183, 198 (4th

Cir. 1981), rev'd on other grounds, _____U.S._____ (1982)(condemning word-of-mouth hiring in all male workforce), and; Baxter v. Savannah Sugar Refining, 495 F.2d 437, 441 (5th Cir. 1974)(condemning the total dependence of blacks upon white supervisors for positive treatment).

The respondents, through the use of the combined evidence described above, established a strong case of discrimination. See Teamsters, supra, 431 U.S. at 335-340.

The petitioner complains " . . . how do the figures prove that any black employee was discharged 'because of such individual's race?'" (Petition, p. 15). The figures, along with the other evidence, show that: chance does not explain the gross statistical disparities; petitioner failed to offer any cre-

dible explanation for the gross disparities; blacks are treated differently; whites, if warned at all, are only warned after consistent long term violations of the rules, and; blacks are discriminated against because the features of the termination policy allow for and encourage such discrimination by a white supervisory force.

In response to the respondents' prima facie case, the petitioner was required to attempt a rebuttal by stating defenses such as: (i) the statistics were inaccurate; (ii) pre-Act actions were improperly included; (iii) post-Act actions have been non-discriminatory, or; (iv) some credible explanation for the statistical disparities. See e.g., Hazlewood, supra, 433 U.S. at 309-311 and Teamsters, supra, 431 U.S. at 360. As stated by the Appellate Court, the peti-

tioner never explained the disparities between the black and white involuntary terminations (41).

As can be readily determined from the foregoing, the lower courts applied well-established law in an entirely appropriate manner. The guidance which the petitioner seeks from this Court is already present in the above-cited cases and is not needed in this case. Seen most charitably, the "guidance" petitioner seeks is the unwarranted overturning of all of the decisions relating to the proof of a case of a pattern or practice of discrimination in employment. Seen realistically, the Petition is an unjustified delay of respondents' proved entitlement to relief.

B. The Use of Statistics by the Lower Courts to Find Discrimination and Affirm Said Finding was Entirely Appropriate.

The petitioner argues that the use of statistics by the lower courts was improper. It should be stressed that the petitioner does not challenge: the accuracy of the figures; the accuracy of the test results or the validity of the utilized methodology.

The petitioner's argument is exactly the same as that rejected by this Court in Teamsters, 431 U.S. at 339-340 (text and footnote 20). Petitioners in that case argued:

> . . . statistics can never in and of themselves prove the existence of a pattern or practice of discrimination or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. 431 U.S. at 339.

This Court has stated at least twice that gross statistical disparities alone can create a prima facie case. Hazlewood, supra, 433 U.S. at 308-309 and Teamsters, supra, 431 U.S. at 339. The

statistical results in this case (exceeding nine (9) standard deviations) were unexplained "gross disparities."[7]

Petitioner's arguments purposefully ignore this Court's holding that "long lasting" gross disparities "are probative . . . because such imbalance is often a telltale sign of purposeful discrimination . . ." Teamsters, supra, 431 U.S. at 339, 340, f.n. 20.

The actions of the lower courts do not require the racial balancing described by the petitioner (Petition, pp. 20-21). The statistics utilized by the lower courts were examined, along with other evidence, only to determine whether purposeful (intentional) discrimination was present. Their use was entirely appropriate. The petitioner's argument

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[7] See p. 4, supra. Furthermore, there was additional evidence which supported the actions of the lower courts. See pp. 3-6, supra.

about the role of statistics should be rejected as it was by this Court in Teamsters.

C. The Use of a Legal Presumption of Discrimination in Favor of Each Class Member was Entirely Appropriate Since a Pattern and Practice of Discrimination was Proved.

The petitioner argues that the legal presumption of discrimination in favor of each class member is "absurd" (Petition, p. 22). The presumption of discrimination was created after overwhelming evidence of a pattern of discrimination was found. The absurdity is that, in the face of overwhelming evidence of discrimination by the employer, the petitioner believes that there should be no presumption. A similar challenge was rejected in Teamsters, 341 U.S. at 357-363, and this method of proof has been approved by

this Court. See also Franks v. Bowman Transportation, 425 U.S. 747, 771-774 (1976).

Petitioner argues that 229 persons have received a legal presumption of discrimination,[8]

> . . . without exploration or even inquiry as to the causes or reasons or circumstances of their respective discharges . . . not a word of testimony nor any shred of evidence has been presented with regard to the cause or circumstances of the discharge of any . . . individuals. (Petition, pp. 9, 11).

These "individuals" faced and met the burden of proving a pattern of discrimination. The petitioner's only response was to show that both blacks and whites were involuntarily terminated.

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[8] The petitioner asserts that the findings of two individual instances of discriminatory treatment cannot establish a class-wide presumption of discrimination (Petition, pp. 19-20). As demonstrated above, the presumption was based on much more than the claims of two persons.

Respondents never asserted that no whites were terminated; they asserted and proved that blacks were more likely to be fired and that the termination policy was used in a discriminatory manner. The petitioner never explained the statistical disparities. Thus, the case should enter the Stage II proceedings with each claimant having a presumption of discrimination in his or her favor.

The petitioner treats the "legal presumption" as if it were irrebutable. However, as established by this Court in Teamsters and Franks, the employer can overcome the presumption by showing at Stage II proceedings, if it can, through the appropriate weight of evidence that a person was terminated for a legitimate, non-discriminatory reason.

The petitioner's arguments concerning the improper role of statistics

and the "absurd" legal presumption of discrimination should be rejected. The well-established authorities of this Court allows for the proper use of statistics and the creation of the presumption. The petitioner simply failed to explain away its racial discrimination and is now seeking to avoid the consequences of its failure to provide equal employment opportunity.

D. Intentional Discrimination was Proved.

In its Petition, the petitioner argues several times that the Act is "individualized" (Petition, p. 10) and that the respondents failed to prove intentional discrimination. These arguments are meritless. In its discussion, the petitioner speaks of "disparate" treatment and impact. It incorrectly asserts that in a disparate impact case

there must be proof of an intent to discriminate (Petition, pp. 12-13).[9]

The Act is not limited to "individualized" treatment when the requirements of F.R.C.P. Rule 23 are met.[10] Class-wide relief is to be granted where circumstances dictate such relief. See e.g., Franks, supra, 424 U.S. at 771-773 and Moody, supra, 422 U.S. at 419-422. The Act becomes "individualized" at the Stage II level when claimants, armed with the presumption of discrimination, seek relief. This relief will be denied if

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[9] Discriminatory motive does not need to be proven in an impact case; in a disparate treatment case, proof of discriminatory motive is critical and can be inferred, in some cases, from differential treatment. See e.g. Teamsters, supra, 431 U.S. at 335, note 15; Griggs v. Duke Power, 401 U.S. 424, 432 (1971).

[10] As stated above at p. 11, the petitioner does not challenge either the District Court's class certification nor the Appellate Court's affirmation of the class certification.

the employer can show that the claimant was terminated for a legitimate reason. The petitioner's approach is to eliminate the class action rule and require 229 individual trials, even though the requirements of the class action rule have been met.

This is a disparate treatment case. As discussed in detail above, respondents presented statistical evidence along with evidence of general policies, overt acts of discrimination and differential treatment. Patterns and practices can be and were used to establish intentional discrimination. See e.g., Teamsters, 431 U.S. at 335-343 (text and footnotes 15-24). The petitioner argues that since there was no proof with regard to the individual discharges, the remaining proof[11] is inadequate to support a

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[11] Incorrectly described by the petitioner as showing that 37.2% of all black

finding of intentional discrimination (Petition, pp. 13-15). As discussed above, the evidence (pp. 3-6, supra) and law (pp. 11-17, supra) support the lower courts' finding and affirmance of intentional discrimination. Statistics such as those present in this case alone can create a prima facie case. If the prima facie is neither statistically explained away nor credibly challenged in a sufficient manner (as is present in this case), a finding and affirmance of intentional discrimination is the appropriate result.

IV.

CONCLUSION

A Writ of Certiorari should not be

Footnote 11 continued

and 21% of all white terminations were involuntary (Petition, p. 14). This description is a deliberate attempt of the petitioner to avoid the test results and the other proof described above at pp. 3-6.

granted for the reasons set forth above. Given the evidence, the lower courts correctly applied well-established law. The petitioner advances arguments which this Court has rejected in the past and should do so again. The petitioner seeks to avoid the consequences of its racial discrimination in employment, which Congress determined to end in 1964. Most employers do not find themselves "hopelessly entangled in 'imbalance' violations of federal law" (Petition, p. 22) because most employers do not violate the law and do provide equal employment opportunity. Petitioner's irrational arguments are so without merit in light of the evidence present in this case and the well-established law of this Court, that they should be summarily rejected. Petitioner has failed to provide a single valid reason for the issuance of a Writ.

Respectfully submitted this the

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APPENDIX
(111-113)

Years	Total Involuntary Terminations	B% of H-T Workforce	Expected #B Terminations
1974-1978	815	15.4[1]	125.5
1974-1978	815	15.7[2]	
1974-1978	815	15.3	
1975	299	16.1	48

[1] Median annual percentage of workforce between 1974-1978.

[2] Average annual percentage of workforce between 1974-1978.

APPENDIX
CONTINUED

Actual Number	Difference
299	103.5
229	
229	
74	26

Standard Deviation	Number of Expected Deviations Beyond Expected
10.304	10.045
	9.725
	10.149
6.356	4.09